VALUABLE LAW WORKS

PUBLISHED BY

STEVENS AND SONS,

LIMITED,

119 & 120, CHANCERY LANE, LONDON, W.C.

Arnould on the Law of Marine Insurance and Average.—*Eighth Edition.* By EDWARD LOUIS DE HART and RALPH ILIFF SIMEY, Barristers-at-Law. *Two Vols. Royal 8vo.* 1909. *Price 3l. 3s. cloth.*

Spencer's ...08, with the New Rul... *Fourth Edition.* By AUBREY ... *Price 6s. cloth.*

Keith's R ...Dominions.— By ART... nd of the Colonial Office. *I*

Macdonell ...-By Sir JOHN MACDO... *Second Edition.* By EDWAR... *Price 25s. cloth.*

Ingpen on ...reatise on the Law relat... OBERT INGPEN, K.C. *Ro*

Dicey's Co ...w of England with refe... V. DICEY, K.C., Hon. D.C

Freeth's D ...o the Estate Duty and ... REETH, Secretary of the Est... IOTT, of the Estate Duty Offi...

Beal's Ca ...tion.—*Second Edit.* Co... at-Law. *Royal 8vo.* 1908. *Pr*

Wright's I ...English, with Notes Ex... GHT, LL.D., Chief Justice of ...gent." *Royal 8vo.* 1908. *Pr*

Williams' ...ptcy.—*Ninth Edition.* ...MER MACKLIN, Barrister-

Woodfall's ...-With a full Collection ..., Barrister-at-Law. *Royal 8vo.*

Theobald's ...ills.—*Seventh Edition.* By H. S. THEOBALD, K.C. *Royal 8vo.* 1908. *Price 1l. 15s. cloth.*

Robertson on the Crown.—The Law and Practice of Civil Proceedings by and against the Crown and Departments of the Government. By G. STUART ROBERTSON, Barrister-at-Law. *Royal 8vo.* 1908. *Price 1l. 18s. cloth.*

Macnamara's Law of Carriers of Merchandise and Passengers by Land. By WALTER HENRY MACNAMARA, Barrister-at-Law, Registrar to the Railway Commission, a Master of the Supreme Court. *Second Edition.* By the AUTHOR and W. A. ROBERTSON, Barrister-at-Law. *Roy. 8vo.* 1908. *Price 1l. 10s. cloth.*

**** *A Catalogue of Modern Law Works, Reports, &c. post free, 6d.*

UNIVERSITY OF CALIFORNIA LOS ANGELES

SCHOOL OF LAW LIBRARY

Annual Practice (The), 1909.—Edited by THOMAS SNOW, Barrister-at-Law; CHARLES BURNEY, a Master of the Supreme Court; and F. A. STRINGER, of the Central Office. *Two Vols.* 8*vo*. *Price, net*, 25*s. cloth.*

*** *A Thin Paper Edition in One Vol. may be had, price, net*, 25*s.*

On Oxford Indian Paper, 3*s.* 6*d. extra.*

A, B, C (The) Guide to the Practice of the Supreme Court, 1909.—By FRANCIS A. STRINGER, of the Central Office. *Royal* 12*mo*. *Price, net*, 5*s. cloth.*

Annual County Courts Practice, 1909.—By His Honour JUDGE SMYLY, K.C., assisted by W. J. BROOKS, Barrister-at-Law. *Two Vols. Demy* 8*vo*. *Price* 1*l.* 5*s. cloth.*

*** *A Thin Paper Edition in One Vol., price* 25*s., or on Indian Paper*, 3*s.* 6*d. extra.*

Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. *Eighteenth Edition.* By MAURICE POWELL, Barrister-at-Law. *Two Vols. Demy* 8*vo*. 1907. *Price* 2*l.* 2*s. cloth.*

Roscoe's Digest of the Law of Evidence and the Practice in Criminal Cases (chiefly on Indictment).—*Thirteenth Edition.* By HERMAN COHEN, Barrister-at-Law. *Demy* 8*vo*. 1908. *Price* 1*l.* 11*s.* 6*d. cloth.*

Knowles' Law relating to Compensation for Injuries to Workmen; being an Exposition of the Workmen's Compensation Act, 1906, and of the Case Law relevant thereto. *Second Edition.* Including the Rules and Forms. By C. M. KNOWLES, Barrister-at-Law. *Demy* 8*vo*. 1907. *Price* 8*s. net, cloth.*

Robinson's Law relating to Income Tax.—*Second Edition.* By ARTHUR ROBINSON, Barrister-at-Law. *Royal* 8*vo*. 1908. *Price* 25*s. cloth.*

Wigram's Justice's Note-Book.—Containing a short account of the Jurisdiction and Duties of Justices, and an Epitome of Criminal Law. *Eighth Edition.* By LEONARD W. KERSHAW, Barrister-at-Law. *Royal* 12*mo*. 1908. *Price* 7*s.* 6*d. cloth.*

Temperley's Merchant Shipping Acts, 1894 to 1907.—*Second Edition.* By ROBERT TEMPERLEY, Solicitor, HUBERT STUART MOORE, Barrister-at-Law, and ALFRED BUCKNILL, Barrister-at-Law. *Royal* 8*vo*. 1907. *Price* 30*s. cloth.*

Godefroi's Law relating to Trusts and Trustees.—*Third Edition.* By WHITMORE L. RICHARDS and JAMES I. STIRLING, Barristers-at-Law. *Royal* 8*vo*. 1907. *Price* 1*l.* 18*s. cloth.*

Heywood & Massey's Lunacy Practice.—By ARTHUR HEYWOOD and ARNOLD MASSEY, Solicitors. *Third Edition.* By the AUTHORS and RALPH C. ROMER, First Class Clerk in the Office of the Masters in Lunacy. *Royal* 8*vo*. 1907. *Price* 25*s. cloth.*

Digest of Cases, Overruled, Approved, or otherwise specially considered in the English Courts.—With extracts from the Judgments. By W. A. G. WOODS and J. RITCHIE, Barristers-at-Law. *Three Vols. Royal* 8*vo*. 1907. *Price* 5*l.* 5*s. cloth.*

Talbot and Fort's Index of Cases Judicially Noticed, 1865 to 1905.—*Second Edition.* By M. R. MEHTA, Barrister-at-Law. *Royal* 8*vo*. 1908. *Price* 1*l.* 18*s. cloth.*

Ten Years' Digest of Reported Cases, 1898—1907.—By E. MANSON, Barrister-at-Law. Being a Consolidation of the Annual Digests. *Two Vols. Royal* 8*vo*. 1908. *Price* 3*l.* 3*s. cloth.*

Jackson and Gosset's Investigation of Title.—Being a Practical Treatise and Alphabetical Digest of the Law connected with the Title to Land, with Precedents of Requisitions. By W. HOWLAND JACKSON and THOROLD GOSSET, Barristers-at-Law. *Third Edition.* By W. HOWLAND JACKSON, Barrister-at-Law. *Demy* 8*vo*. 1907. *Price* 15*s. cloth.*

Emanuel's Law relating to Dogs.—By MONTAGUE R. EMANUEL, Barrister-at-Law. *Demy* 12*mo*. 1908. *Price* 3*s.* 6*d. cloth.*

THE

LAW OF DISTRESS,

WITH AN

APPENDIX OF FORMS, TABLE OF STATUTES, &c.

BY

ARTHUR OLDHAM,

OF THE INNER TEMPLE AND SOUTH EASTERN CIRCUIT,

AND

A. La TROBE FOSTER, B.A.

OF JESUS COLLEGE, CAMBRIDGE, OF THE MIDDLE TEMPLE, AND NORTHERN CIRCUIT,

BARRISTERS-AT-LAW.

SECOND EDITION.

LONDON:

STEVENS AND SONS, LIMITED,

Law Publishers and Booksellers,

119, CHANCERY LANE,

1889

T
OL 17 d
1889

334565
9.16.60
U.T.H.

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE.

KY G-27-60

PREFACE

TO THE SECOND EDITION.

A Second Edition of this Book having been called for, we have carefully revised the whole work, and included the Law of Distress Amendment Act, 1888, which contains important alterations with regard to bailiffs and appraisements, and adopts sects. 50 and 52 of the Agricultural Holdings (England) Act, 1883, making these sections now apply to *any* holdings, and not, as previously, to holdings under the Act.

It also confers a new exemption from distress upon wearing apparel, bedding, and tools of trade to the value of £5, following the provisions of sect. 96 of the County Courts Act, 1846, with regard to executions.

The fact also that the County Courts Act, 1888, and the Rules drawn pursuant thereto, have consolidated and amended all previous County Court Acts and Rules, has necessitated considerable revision in the Chapter on Replevin.

All decisions reported since the last edition have been noted down to the date of publication.

ARTHUR OLDHAM.
A. La TROBE FOSTER.

1, Paper Buildings, Temple.
February, 1889.

PREFACE

TO THE FIRST EDITION.

It is more than forty years since Mr. Bullen's Treatise on the Law of Distress was presented to the public.

This of itself would be sufficient to justify the Authors in attempting to supply a want that must have been felt by the profession, in spite of the valuable assistance afforded by the recent editions of Woodfall's Landlord and Tenant. They have, therefore, by collecting the cases and statutes bearing on the subject, endeavoured to produce a work which they hope will be of service. At the same time it has been their wish to make as interesting as possible what would otherwise be somewhat dry and technical.

The first two Chapters are devoted to the Origin and Progress of Rent, from the earliest days to the present time. The different classes of persons who are entitled to distrain are then discussed. This includes distress in case of mortgages, bankruptcy, and the winding up of companies—a branch of law which is of comparatively modern growth.

After stating at length the proper method of distraining, the Authors give in full detail the

exemptions conferred on certain persons and goods, and the remedies provided for wrongful, irregular, and excessive distresses.

Next follows a distinct branch of the subject, the law of distress relating to damage feasant and replevin. The last Chapter has been devoted to the summary methods provided by the Legislature for the recovery of poor and highway rates, and the enforcement of the orders and convictions of justices.

In this book every decision on the subject since 1780 has, as far as possible, been cited, as well as all material cases prior to that date. References have been given to all the reports, and all statutes bearing on distress have also been referred to, especially the Lodgers' Goods Protection Act, 1871, the Conveyancing and Law of Property Act, 1881, and the Agricultural Holdings (England) Act, 1883.

ARTHUR OLDHAM,
3, Harcourt Buildings, Temple.

A. La TROBE FOSTER,
3, Dr. Johnson's Buildings, Temple.

January, 1886.

CONTENTS.

PART I.

OF A DISTRESS FOR RENT.

CHAPTER I.

OF RENTS IN RELATION TO A DISTRESS.

	PAGE
SECT. I.—*Of Rents generally*	1—6
Origin of rent	1, 2
Definition of rent	2
Essentials of a rent	2—6
SECT. II.—*Of the several kinds of Rent*	6—20
Rent service	6—14
origin of	6
essentials of	7—11
to whom and how it must be reserved	11—14
improper reservations	12, 13
effect of Conveyancing Act, 1881, s. 44	14
Rent-charge	14—16
Rent-seck	16
Fee farm rent	16, 17
Rents of assize	17
Chief rents	17
Quit rents	17
Copyhold rents	17
Rents payable in advance	17—19
Rents distrainable of common right	19, 20
Effect of the 4 Geo. II. c. 28, s. 5	20
Distress now incident to every species of rent	20
Seisin of rent	20

CHAPTER II.

Of the Apportionment of Rent.

PAGE
(a) Apportionment of rent in respect of estate 21—26
as regards rent-service 21—24
effect of Conveyancing Act, 1881, s. 10 23, 24
as regards a rent-charge 24—26
(b) Apportionment of rent in respect of time 26—28
Apportionment Act, 1870 26—28

CHAPTER III.

Who may Distrain.

(a) Actual demise at a fixed rent 29—40
weekly tenancies 32, 33
tenancies on sufferance 33
the rent must be certain 33—35
postponement of right of distress 36
acknowledgment of antecedent tenancy 36
surrender 36, 37
eviction 37, 38
notice to quit 38, 39
custom of the country 39
mistake 39, 40
(b) Reversioners 40—45
severance of reversion 40, 41
assignment of reversion 41, 42
surrender 43—45
(c) Coparceners 45—47
after partition 45, 46
tortious acts of coparceners 46, 47
unity of seisin 47
(d) Coheirs in gavelkind 47
(e) Joint tenants 47—50
severance of their estate 48, 49
demise by joint tenants 49, 50
(f) Tenants in common 50, 51
in case of replevin 50
leases between 51
allotments under the Inclosure Acts 51
(g) Tenants in fee simple 51, 52
(h) Tenants in tail 52

PAGE

(i) Tenants for life 52, 53
effect of 32 Hen. VIII. c. 37, s. 4 53
effect of 8 Anne, c. 14, s. 6 53

(j) Tenants by the curtesy 54

(k) Tenants in dower and freebench 54, 55
lands taken in lieu of dower 54

(l) Tenants under execution 55
in case of rent-charge 55
in case of rent-service 55
tenants by elegit 55

(m) Heirs 56, 57

(n) Executors and administrators 57—61
effect of 32 Hen. VIII. c. 37, s. 1 57, 58
effect of 3 & 4 Will. IV. c. 42, s. 37 58, 59
rights of executors and administrators *inter se* 60, 61
time when an executor must distrain 61
time when an administrator must distrain 61

(o) Devisees and legatees 61—63

(p) Trustees 63

(q) Lords of manors and commoners 63—66
right to distrain by escheat 63, 64
commoners' right to distrain *inter se* 64, 65
suspension of a right of common 65, 66

(r) Annuitants 66, 67
distinction between an annuity and a rent-charge .. 66, 67

(s) Grantees of rent-charges 68—70
distress by assignee of a rent-charge 68, 69
effect of Conveyancing Act, 1881, sect. 44, sub-ss. 1, 2 .. 70

(t) Owners of tithes 70—76
Tithe Commutation Acts 70—76
provisions in case of Quakers 73
summary remedy in respect of lammas lands and commons in gross 74, 75

(u) Guardians 76, 77

(v) Committees of lunatics 77

(w) Husbands and wives 77, 78
effect of 32 Hen. VIII. c. 37, s. 3 78
effect of 3 & 4 Will. IV. c. 42, s. 37 78
effect of the Married Women's Property Act, 1882 .. 78

(x) Receivers and agents 78—82
private receivers 79, 80
receivers appointed by the Court 80, 81
agents 81, 82

PAGE

(y) Corporations 82—86
corporations sole 82—84
corporations aggregate 84—86
parish officers 86
(z) Sequestrators 86

CHAPTER IV.

Who may Distrain in the case of Mortgages, Bankruptcy, and the Winding up of Companies.

(a) Mortgages 87—93
(1) Where a lease has been made before the date of the mortgage deed 89, 90
effect of Judicature Act, 1873, sect. 25, sub-sect. 5 .. 90
(2) Where a lease has been made after the date of the mortgage deed 91—93
(b) Bankruptcy 93—103
Bankruptcy Act, 1883 93, 94
Bills of Sale Act, 1878, sect. 6 100
(c) Companies 103—113
The Companies Act, 1862 104—106

CHAPTER V.

What may or may not be Distrained.

(1) Persons exempted from distress 114—118
(a) Persons holding by title paramount 115, 116
(b) Copyholders 116
(c) Joint tenants 116
(d) Strangers 116
(e) Under-tenants 116, 117
effect of the 4 Geo. II. c. 28, s. 6 116, 117
(f) The Crown 117, 118
(g) Ambassadors 118
effect of the 7 Anne, c. 12, s. 3 118
(h) Distress on possession limited by statute 118

PAGE

(2) Goods privileged from distress 119—163
I. Things absolutely privileged 119—146
(1) Things annexed to the freehold 119—125
fixtures 120—123
growing crops 123—125
(2) Goods delivered to a person in the way of his trade..125—137
meaning of "public trade" 125—127
cattle on their way to a fair 127, 128
meaning of things "to be carried or wrought" 128—131
meaning of things delivered "to be managed" ..131—133
factors and auctioneers 133—136
pawnbrokers 136
goods at an inn 136, 137
(3) Cocks and sheaves of corn, and things which cannot be restored in same plight.. 137—139
effect of 2 Will. & Mary, sess. 1, c. 5, s. 3 .. 138, 139
effect of 4 Geo. II. c. 28, s. 5 138, 139
(4) Things in actual use 139—141
(5) Animals *feræ naturæ* 141
(6) Things in the custody of the law.. 141—146
effect of the 8 Anne, c. 14, s. 1 142
effect of the 14 & 15 Vict. c. 25, s. 2 143
effect of the 56 Geo. III. c. 50 144, 145
effect of the Agricultural Holdings (England) Act, 1883 145
(7) Wearing apparel, bedding, and tools of trade to value of 5*l.* 145, 146
II. Things conditionally privileged 146—151
(1) Beasts of the plough and instruments of husbandry 146—150
effect of the 51 Hen. III. stat. 4 146, 147
effect of the Agricultural Holdings (England) Act, 1883 147—150
(2) Instruments of a man's trade or profession .. 150, 151
III. Things privileged by statute 151—163
(1) Railway rolling stock 151—154
effect of the Railway Rolling Stock Protection Act, 1872 151—154
(2) Frames, &c., used in woollen manufactories .. 154, 155
effect of the 6 & 7 Vict. c. 40 154, 155
(3) Gasworks Clauses Act 155, 156
(4) Lodgers' goods 156—162
effect of the Lodgers' Goods Protection Act, 1871..156—158
definition of a "lodger" 158—162
(5) Law of Distress Amendment Act, 1888 162, 163
wearing apparel, bedding, &c. 163
sect. 96 of County Courts Act, 1846 163

CHAPTER VI.

Of the Proceedings in a Distress for Rent.

PAGE

I. (a) When rent is due 164—168
when in arrear 164
demand of rent 164—166
difference between distress and re-entry as to demand 164
(b) Rent payable in advance.. 168—171
by custom 168, 169
rent payable on a condition precedent 170
(c) The amount of rent for which a distress may be made ..171—174
distress must not be made for more rent than is due .. 171
where different properties are included in same lease 171
where the rent consists of several amounts 172
where rent is entire 172
(d) Deductions from rent 174—177
when a tenant may make deductions.. 175
effect of the Agricultural Holdings (England) Act, 1883 .. 177
(e) Double rent 177, 178
effect of the 11 Geo. II. c. 19, s. 18 177
(f) Effect of the Statutes of Limitations 178—181
3 & 4 Will. IV. c. 27, s. 42 178, 179
38 & 39 Vict. c. 57, s. 1 178
Agricultural Holdings (England) Act, 1883 .. 180, 181
(g) Demand of rent previous to a distress 181—184
power of distress after demand 182
when a demand is necessary 182
II. (a) Distress, when to be made as to time 184
meaning of sunrise and sunset 184
(b) Distress after expiration of tenancy 185—188
effect of the 8 Anne, c. 14, ss. 6 and 7 185
custom of the country 186
effect of the 14 & 15 Vict. c. 25, s. 1.. 186
(c) Waiver of forfeiture 188, 189
waiver by distress 189
(d) Waiver of notice to quit 190
waiver of disclaimer 190
(e) Ejectment 190—192
effect of the Common Law Procedure Act, 1852 190
meaning of "no sufficient distress" 191
III. (a) Where the distress may be made 192—196
effect of the Statute of Marlbridge 193
distress on the highway 194, 195
exception in case of the Crown 195
cattle on a common 195

PAGE

III. (b) Fraudulent removal 196—202
effect of the 8 Anne, c. 14, s. 2 196
effect of the 11 Geo. II. c. 19 196
as to the removal 198—200
in case of bankruptcy of a lessee.. 200
distresses in the metropolitan police district 201
treble damages 202
(c) Remedies in case of fraudulent removal 202—207
effect of the 11 Geo. II. c. 19 202
forfeiture of double value 202—204
where goods under 50*l*... 202, 203
IV. (a) Distress how made 207—265
liability of a landlord for his bailiff's acts .. 207—209
effect of the Law of Distress Amendment Act, 1888 .. 207, 209—214
liability of landlord for bailiff's acts 208, 209
distinction between illegal and irregular acts 209
theft by bailiff 209
bailiffs must be certified 210—214
by whom certificate granted 211
rules as to certificates 212, 213
special certificate 212
general certificate 212
security 212, 213
forfeiture of security 213
fees for certificates and securities 213
(b) Warrant of distress 214—216
effect of warrant 215
(c) Indemnity to broker 216—218
where broker takes goods privileged from distress .. 217
(d) Entry 218—221
instances of legal and illegal entry 219—221
(e) Re-entry 221—224
in case of abandonment 222
(f) Seizure.. 224—226
constructive seizure 225
hire-purchase system 226
(g) Inventory 226—229
notice of distress 227
parol notice 227
what the notice should state 228, 229
want of notice.. 228, 229
(h) Impounding 229—242
at common law 229
effect of 2 Will. & Mary, c. 5 230
different kinds of pounds 230, 231

IV. (h) Impounding—*continued.* PAGE
effect of 12 & 13 Vict. c. 92, s. 5 231
as to the pound keeper 231, 232
entry into pound 232
effect of 17 & 18 Vict. c. 60 232, 233
recovery of compensation for food provided 233
power of sale 233
theft from a pound 234
escape from a pound 235
abuse of the distress 235
where the distress may be impounded 236—239
effect of the Statute of Marlbridge 236
effect of 1 & 2 Phil. & Mary, c. 12, s. 1 .. 236, 237
impounding on the premises under the 11 Geo. II. c. 19, s. 10 238
what is an impounding 239
removal of goods to public auction room 239
assent to impounding 239
what is a sufficient impounding 240
what must be impounded on the premises 241
(i) Appraisement 242—248
effect of 2 Will. & Mary, sess. 1, c. 5, s. 2 .. 242, 243
appraisers need not be sworn 243
effect of the Law of Distress Amendment Act, 1888 244
stamp on appraisement 245
penalties 245
number of appraisers required 246
appraisers must be competent 247
view and valuation 248
(j) Sale 248—256
effect of 2 Will. & Mary, sess. 1, c. 5 249
how the five days are to be reckoned 251, 252
effect of Law of Distress Amendment Act, 1888 .. 249, 250
consent by tenant for goods to remain on the premises .. 253
search in County Court for replevins 254
landlord may not buy 254
meaning of "best price" 254
no order need be observed in the sale 255
(k) Expenses of the distress 256—262
where the costs are under 20*l.* 257—259
schedule of expenses under the Law of Distress Amendment Act, 1888 257
remedies under 57 Geo. III. c. 93 257, 258
where the costs are over 20*l.* 259—261
effect of the Law of Distress Amendment Act, 1888 ..259, 260
copy of charges 261
expenses of impounding 262

PAGE
(l) Surplus proceeds 262—265
meaning of "surplus" 263
return of surplus 264

CHAPTER VII.

Satisfaction of Arrears of Rent by the Execution Creditor.

Effect of the 8 Anne, c. 14 266—280
one year's rent may be claimed 266, 267
exception in favour of the Crown 267
weekly tenancies 267
construction of the statute 267
persons who come under the statute 268
to what the Act applies 268—271
forehand rents 271
landlord may claim one year's rent 271—273
as to executors and administrators 273
notice to the sheriff 274, 275
notice to execution creditor 275
poundage 276
measure of damages 276
43 Geo. III. c. 99, s. 37 276, 277
Taxes Management Act, 1880 277
Execution under County Court process 278, 279
the County Courts Act, 1888, s. 160 278, 279
Execution under admiralty process 279, 280

CHAPTER VIII.

By what Means the Right of Distress may be taken away.

Where no actual demise at a fixed rent 281
By determination of the lessor's interest 282
Where lessor parts with his reversion 282
Merger of the reversion 282
By the non-performance of a condition precedent 282
(a) By agreement not to distrain 283, 284
acceptance of single instead of double rent 284
condition precedent 284
(b) Effect of an agreement for interest on rent 284

PAGE

(c) Effect of taking a security for the rent 285, 286
promissory notes 285
bills of exchange 285, 286
(d) Second distress 286—291
(1) In case of insufficiency 286—290
effect of 17 Car. II. c. 7, s. 4 287
abandonment of the first distress 288
mistake in the value of the goods 288, 289
withdrawal of the distress 289, 290
(2) In case of replevin 290, 291
of the same goods 291
(e) By payment of the rent in arrear 291
(f) By tender of the rent in arrear 291—295
tender without expenses 291, 292
to whom it may be made 292, 293
tender before impounding 293
tender after impounding 293, 294
what is an impounding 294, 295
(g) Restraining a distress by injunction 295, 296
effect of the Judicature Act, 1875 295

CHAPTER IX.

Of a Distress of Things Damage Feasant.

Definition of damage feasant 297
Applies to inanimate things 297
Distinction between distress for rent and damage feasant 298
Who may distrain 298—301
commoners 298—300
agistment of cattle by the lord 299
colour of right 299
agreement between commoners as to right of distress .. 299, 300
concurrent possession of land to take profits of special nature 300
cattle carried to a public fair 300, 301
By whom distress damage feasant may be made 301, 302, 307
no exemption except of things in actual use 301, 302
As to trespassing cattle 302, 303
time when cattle should be removed 303, 304
defects in fences 304, 305
second distress of cattle 306
Remedies 306, 309, 310
As to the pound 307—309
abuse of the distress 307, 308
Tender 308

Part II.

REMEDIES FOR WRONGFUL DISTRESS.

CHAPTER X.

Of Rescue and Pound Breach.

	PAGE
Definitions of rescue and pound breach	311, 312
Rescue in law and in deed	312
actual force not necessary	312, 313
Rescue before impounding	313, 314
by whom it may be made	314
Abandonment of the distress	314
Abuse of the distress	314, 315
Remedies for unlawful rescue or pound breach	315—319
who is entitled to the remedy	315, 316
exception in case of the Crown	315
effect of 2 Will. & Mary, sess. 1, c. 5	316
treble damages	316, 317
effect of 6 & 7 Vict. c. 30	317—319
release of cattle from the pound	318
damage to the pound	318
penalty	318, 319
ousting of justices' jurisdiction	319

CHAPTER XI.

Remedies for Wrongful Distress.

Wrongful distress	320—326
form of action	320
damages recoverable	321
where distress is void *ab initio*	321, 322
distress taken in the highway	322
effect of Statute of Marlbridge	323
recovery of double value under 2 Will. & Mary, sess. 1, c. 5, s. 5	323
what is a taking	323
waiver of right of action	324
form of indorsement of writ	324, 325
statement of claim	325
evidence	325
summary remedy in the Metropolitan Police District	325, 326

PAGE

Irregular distress 326—334
effect of 11 Geo. II. c. 19, s. 19 326—328
recovery of special damage 327
costs 327
does not apply to damage feasant 327
nor where distress void *ab initio* 327, 328
mere irregularity 328
form of action 328, 329
nominal damages 329
instances of irregularity 329—332
sale after notice of replevin 329, 330
severance of fixtures 330
goods sold without appraisement 330
neglect to give copy of costs 331
effect of 11 Geo. II. c. 19, s. 21 332, 333
Excessive distress 334—341
at common law 334
what is excessive 335
where distress wrongful as well as excessive 336
what property in the goods must be shown 336, 337
special property 337
what must be proved 339, 340
express malice 339
damages 339, 340
as to auctioneers 340, 341
joint actions 341

CHAPTER XII.

Proceedings in Replevin.

Definitions of replevin 342, 344
Writ of *capias in withernam* 343, 367, 368
To what replevin extends 344, 345
When replevin lies 345, 346
Time for making a replevin 346, 347
in distress damage feasant 347
extension of time under the Law of Distress Amendment Act, 1888.. 347
What may be replevied 348
By whom replevin may be had 348, 349
joint tenants and tenants in common 349
married women 349
executors and administrators 349

PAGE

Against whom replevin may be had 349, 350
brokers.. 350
corporations 350
County Courts Act, 1888, as to sheriff's jurisdiction 350, 351
Action of replevin in the High Court 351, 364 *et seq.*
time for commencing 364
indorsement of the writ 364
damages 365, 367
defences 366
avowry and cognizance 366
payment into Court 366
discontinuance of action 366
non-suit 366, 367
execution 367
writ "*de retorno habendo*" 367, 368
Action of replevin in the County Court 351 *et seq.*
County Court Rules, 1889 354—356, 360, 362, 363
as to security 352—354, 370
as to the bond 354, 355, 370
certiorari 352, 369, 370
meaning of prosecution "with effect and without delay" 343, 351, 357—359
deposit in lieu of bond 355, 370
county court fees 356, 357
evidence for plaintiff 361
evidence for defendant 361, 362
judgment 362—364, 373
costs 363
new trial 363
appeal 364
writ of recaption 370, 371
writ of second deliverance and return irreplevisable .. 371, 372
liability of sureties 372, 373
right to begin 373
sheriff's jurisdiction 350, 351
proceedings on the replevin bond 372

Part III.

DISTRESS FOR POOR AND HIGHWAY RATES, &c.

CHAPTER XIII.

PAGE

Sect. I.—*Distress for Poor and Highway Rates, and Taxes* .. 374—398
Powers of distress and sale 374
Power of committal 374
Powers of succeeding overseers 374, 375
I. As to the poor rate 376—393
what the rate must show 376
evidence of the rate 376
demand of the rate 376, 377
complaint 377
summons 378
service of 378
proof of 378
warrant of distress 379 *et seq.*
when justices are bound to issue the warrant .. 379, 383
invalid warrants 379—382
to whom it should be directed 382
mandamus 383—385
costs 385, 386
broker's charges 386
commitment in default of distress 386
warrant of commitment 386
order for imprisonment 386, 387
removal of goods to avoid a distress 387
tender of rate and costs 388
appeal and stay of proceedings 388—393
where the rate is quashed 389
where the goods may be levied 391, 392
II. As to the highway rate 393, 394
recovery of costs 393, 394
how the warrant is to be directed 393
payment or tender of rate 394
appeal 394
III. Taxes 395—398
The Taxes Management Act, 1880 395—398
distress by collector 395
breaking open houses 395
levy 395, 396
committal 397, 398

PAGE

SECT. II.—*Distress for the enforcement of Orders and Convictions of Justices* 398—413
Warrant of distress for recovery of penalty or sum .. 398, 399
Power to postpone the issue of a warrant 399, 400
Costs 400, 401, 409, 412
Committal to prison 401, 402, 406, 409
When the warrant is returnable 402, 403
How the warrant should be backed 403
Execution of the warrant 403
Requisites of the warrant 404
Liability of constables 405
Where there is not sufficient distress 405
Return of "*nulla bonâ*" 406
Protection to justices 407
The order for the warrant 408, 409
Sale of the distress 411
Wrongful retainer of produce 411, 412
Payment or tender 412
Execution of warrant of English Court in Scotland, and of Scotch Court in England 412, 413

APPENDICES A. B. C. D. (Forms) 415—475

INDEX 477—536

TABLE OF CASES CITED.

A.

PAGE

Abbey *v.* Petch, 8 M. & W. 419; 10 L. J. Ex. 455 - 145, 255
Absalom *v.* King, Bull. N. P. 181 - - - - - 285
Acocks *v.* Phillips, 5 H. & N. 183 - - - - 165
Adams *v.* Grane, 1 C. & M. 380; 2 L. J. Ex. 105; 3 Tyr. 326 - 135
Alchorne *v.* Gomme, 2 Bing. 54; 9 Moo. 130 - - - 91
Aldenburgh *v.* Peaple, 6 C. & P. 212 - - - - 184
Alford *v.* Vickery, 1 Car. & M. 280 - - - 33, 38, 190
Allan *v.* Backhouse, 2 Ves. & Beam. 74 - - - - 62
Allen *v.* Flicker, 10 Ad. & Ell. 640; 9 L. J. Q. B. 42 - - 246
Allen *v.* Overseers of Liverpool, L. R. 9 Q. B. 180; 43 L. J. M. C. 69 - - - - - - - - 159
Allen *v.* Sharp, 2 Exch. 352 - - - - - 344
Alwayes *v.* Broome, 2 Lutw. 1262 - - - - 312, 315
Ambergate Rail. Co. *v.* Midland Rail. Co., 2 Ell. & Bl. 793; 23 L. J. Q. B. 17 - - - - - - 234, 297
Anderson *v.* Midland Rail. Co., 3 E. & E. 614; 7 Jur. N. S. 411; 30 L. J. Q. B. 94; 3 L. T. N. S. 809 - - 30, 88, 198, 271
Andrew *v.* Hancock, 1 B. & B. 37 - - - 176, 285
Andrews *v.* Dixon, 3 B. & Ald. 645 - - - - - 274
Andrews *v.* Russell, Bull. N. P. 81 - - - - 247
Angell *v.* Harrison, 17 L. J. Q. B. 25; 12 Jur. 114 - - - 198
Angell *v.* Randall, 16 L. T. N. S. 489 - - - - 18
Angustien *v.* Challis, 1 Exch. 279 - - - - 275, 276
Ankerstein *v.* Clarke, 4 T. R. 617 - - - - 77
Anscombe *v.* Shore, 1 Taunt. 261; 1 Camp. 285 - - 308, 337
Appleton *v.* Doily, Yelv. 135; Bull. N. P. 57 - - - 63
Arnett *v.* Garnett, 3 B. & A. 440 - - - - 269, 275
Arnison, Ex parte. (See Heysham *v.* Heskett.)
Arnold *v.* Poole, 4 M. & G. 860; 2 Dowl. N. S. 574 - - 84
Arnsby *v.* Woodward, 6 B. & C. 519 - - - - - 116
Arundel *v.* Trevill, Sid. 80 - - - - - 349
Ashmore *v.* Hardy, 7 C. & P. 501 - - - - - 198

PAGE

Attack *v.* Bramwell, 3 B. & S. 520; 32 L. J. Q. B. 146; 7 L. T. N. S. 740 - - - - - - 185, 221, 322
Att.-Gen. *v.* Donaldson, 10 M. & W. 117 - - - - 84
Att.-Gen. *v.* Leonard, 38 Ch. Div. 622; 57 L. J. Ch. 860; 59 L. T. N. S. 624; 37 W. R. 24 - - - - 83, 118, 267
Att.-Gen. *v.* Mayor of Coventry, 2 Vern. 713; 1 P. Wms. 306 - 84
Austen *v.* Haward, 7 Taunt. 327 - - - - - 355
Austin *v.* Whitred, Willes, 623, n. (a), 628 - - 127, 301
Avenall *v.* Croker, Moo. & Malk. 172 - - - - 335
Axford *v.* Perrett, 5 Bing. 586 - - - - - 359
Ayshford, In re, Ex parte Lovering, 35 W. R. 652 - - - 159

B.

Bach *v.* Meats, 5 M. & S. 200 - - - - 199, 201, 204
Badkin *v.* Powell, Cowp. 478 - - - - 235, 236
Bagge *v.* Mawby, 8 Exch. 641; 22 L. J. Ex. 236 - 102, 172, 288, 289
Bagshawe *v.* Goward, Cro. Jac. 148 - - - - 235, 307
Bail *v.* Mellor, 19 L. J. Ex. 279 - - - - - 341
Bailey *v.* Badham, 30 Ch. Div. 84; 53 L. T. N. S. 13; 1 T. L. R. 548 - - - - - - - - 72
Bailey *v.* Mason, 2 Ir. C. L. R. 582 - - - - 189
Baker *v.* Leathes, Wightwick, 113 - - - - - 300
Bannister *v.* Hyde, 2 E. & E. 627; 29 L. J. Q. B. 141; 1 L. T. N. S. 438 - - - - - - - 222
Barnes *v.* Lucas, Ry. & Moo. 264 - - - - - 355
Barnes *v.* White, 14 L. J. M. C. 65 - - - - 408
Barons *v.* Luscombe, 3 Ad. & Ell. 589 - - - - 400
Barshaw *v.* Bullock, 2 P. & D. 241 - - - - 269
Barton *v.* Rock, 22 Beav. 81 - - - - - - - 80
Barwick *v.* Foster, Cro. Jac. 227, 233, 310; Yelv. 167 - - 168
Baster *v.* Carew, 3 B. & C. 649; 5 D. & Ry. 558 - - - 205
Bateman *v.* Farnsworth, 29 L. J. Ex. 365 - - - 276
Bates *v.* Duke of Beaufort, 8 Jur. N. S. 270 - - - - - 120
Baylis *v.* Fisher, 7 Bing. 153; 4 M. & P. 790 - - - 323
Bayly *v.* Murin, 1 Vent. 245 - - - - - - - 168
Bayly *v.* Went, 51 L. T. N. S. 764 - - - 81, 296
Baynes *v.* Smith, 1 Esp. 207 - - - - - - - 140
Beard *v.* Knight, 8 E. & B. 865; 27 L. J. Q. B. 358 - 142, 279
Beavan *v.* Delahay, 1 H. Bl. 5 - - - 39, 53, 186, 194
Beck *v.* Denbigh, 29 L. J. C. P. 273; 2 L. T. N. S. 154; 6 Jur. N. S. 998; 8 W. R. 392 - - - - - - 123
Bedell *v.* Constable, Vaughan, 179 - - - - - - 76

PAGE

Bedford *v.* Sutton Coldfield, 3 C. B. N. S. 449; 27 L. J. C. P. 105; 4 Jur. N. S. 133 - - - - - - - 76
Begbie *v.* Crook, 4 L. J. C. P. 264 - - - - - 63
Begbie *v.* Hayne, 2 Bing. N. C. 124; 2 Scott, 193 - - 207
Bellasis *v.* Burbridge, 1 Lutw. 214 - - - - - 138
Bendloss *v.* Phillips, Cro. Eliz. 895 - - - - 56
Bendyshe *v.* Pearce, 4 Moore, 99; 1 B. & B. 460 - - - 75
Bennett *v.* Bayes, 5 H. & N. 391; 29 L. J. Ex. 391; 2 L. T. N. S. 156 - - - - - - - - 292
Bennett *v.* Robins, 5 C. & P. 379 - - - - 80
Bennett's Case, Stra. 787 - - - - - - 268
Berry *v.* Huckstable, 14 Jur. 718 - - - - 317
Bessell *v.* Wilson, 1 E. & B. 489 - - - - - 408
Best *v.* Drake, 11 Hare, 369 - - - - - 295
Betts *v.* Gibbins, 2 Ad. & Ell. 57; 4 L. J. K. B. 1 - - - 217
Bevils' Case, 4 Co. Rep. 11 b; 9 Co. Rep. 23 b - - - 314
Bew, Re, Ex parte Bull, 18 Q. B. D. 642; 56 L. T. N. S. 571 - 181
Bible *v.* Hussey, 2 Ir. C. L. R. 308; 16 W. R. 710 - 269, 275
Biddle *v.* Bond, 6 B. & S. 225 - - - - - 341
Biggius *v.* Goude, 2 Cr. & Jer. 364; 1 L. J. Ex. 129; 2 Tyr. 447 - 246, 330
Bignell *v.* Clarke, 5 H. & N. 485; 29 L. J. Ex. 257; 2 L. T. N. S. 189 - - - - - - - - 234
Binstead *v.* Buck, 2 W. Bl. 1117 - - - - - 141
Birch *v.* Wright, 1 T. R. 380- - - - - - 172
Bird *v.* Higginson, 6 Ad. & E. 824 - - - - 85
Birmingham Gas Co., Re Adams, L. R. 11 Eq. 204; 24 L. T. N. S. 42 - - - - - - - 95
Birmingham Gas Co., Re Fanshawe, L. R. 11 Eq. 615; 40 L. J. Bktcy. 52; 19 W. R. 603; 24 L. T. N. S. 639 - 95, 100
Bishop *v.* Bryan, 6 C. & P. 484 - - - 246, 248, 255
Bishop of Bristol's Case, 3 Leon. 113 - - - - 55
Bissett *v.* Caldwell, 1 Peake, 50 - - - - - 140
Blachford *v.* Cole, 5 C. B. N. S. 514 - - - - 41
Blackey *v.* Dinsdale, Cowp. 661 - - - - - 200
Blades *v.* Arundale, 1 M. & S. 711 - - - 143, 268
Bland *v.* Inman, Cro. Car. 288 - - - - - 56
Bliss *v.* Collings, 5 B. & A. 876 - - - - - 23
Blunden's Case, Cro. Eliz. 56 - - - - - 167
Blyth *v.* Dennett, 13 C. B. 178 - - - - - 190
Bolton *v.* Canham, Pollexf. 120 - - - - - 114
Bonaker *v.* Evans, 16 Q. B. 162 - - - - - 86
Boraston *v.* Green, 16 East, 81 - - - - - 186
Boulton *v.* Reynolds, 2 El. & E. 369; 29 L. J. Q. B. 11; 1 L. T. N. S. 166 - - - - - - - - 292

PAGE

Bowen *v.* Evans, 3 Ex. 111 - - - - - - 368
Bowles *v.* Poore, Cro. Jac. 282 - - - - - 77
Boyd *v.* Profaze, 16 L. T. N. S. 431 - - - - - 222
Boyle *v.* Tamlyn, 6 B. & C. 329 - - - - - 305
Brackenbury *v.* Pell, 12 East, 587 - - - - - 358
Bradbury *v.* Wright, 2 Doug. 628 - - -15, 17, 20, 52
Bradley, Ex parte, 1 Dea. & Chit. 223 - - - - 101
Bradyll *v.* Ball, 1 Bro. C. C. 427 - - - - - 94
Braithwaite *v.* Cooksey, 1 H. Bl. 465- - - 53, 60, 114, 187
Branding *v.* Kent, 1 T. R. 62; Cowp. 476 - - 235, 332
Brandon *v.* Brandon, 5 Mad. 473 - - - - - 80
Branscombe *v.* Bridges, 2 Dowl. & Ryl. 256; 1 B. & C. 145; 3 Stark. 171 - - - - - -291, 292, 336
Branscombe *v.* Scarborough, 6 Q. B. 13 - - - - 372
Branston *v.* Robins, 4 Bing. 11; 12 Moore, 68 - - 40, 284
Brennan *v.* Hood, 4 Ir. C. L. R. Q. B. 332 - - - - 51
Bridges *v.* Smyth, 5 Bing. 410; 2 M. & P. 470 - - 38, 189
Bridgwater Engineering Co., Re, L. R. 12 Ch. D. 181; 48 L. J. Ch. 389 - - - - - - 93, 105, 106, 109
Briggs *v.* Sowry, 8 M. & W. 729 - - - - 103, 143
Brocklehurst *v.* Lawe, 7 Ell. & Bl. 176; 26 L. J. Q. B. 107- - 96
Bromley *v.* Holder, 1 M. & M. 175 - - - - 205
Brooke *v.* Noakes, 8 B. & C. 537; 2 Man. & Ry. 570 - - 204
Brown *v.* Arundel, 10 C. B. 54; 20 L. J. C. P. 30; 16 L. T. N. S. 126 - - - - - - - - 135
Brown, Bailey and Dixon, In re, L. R. 18 Ch. D. 649 - 108, 109
Brown *v.* Glenn, 16 Q. B. 254; 20 L. J. Q. B. 205 - - 219
Brown *v.* Hutchinson, 31 L. J. M. C. 229 - - - - 379
Brown *v.* Metropolitan Life Assurance Society, 4 H. & N. 428; 1 E. & E. 832; 28 L. J. Q. B. 236 - - - 40, 68, 92
Brown *v.* Owen, 11 Q. B. 130 - - - - - 295
Brown *v.* Powell, 4 Bing. 230; 12 Moore, 454 - - 293, 309
Brown *v.* Shevill, 2 A. & E. 138 - - - - - 126
Brown *v.* Storey, 1 M. & G. 117; 1 Scott, N. C. 91 - - 91
Browne *v.* Dunnery, Hob. 208 - - - - 181, 182
Browne *v.* Mattire, Cas. temp. Hardw. 119 - - - 349
Brownhall *v.* Norton, Sir T. Jones, 193 - - - - 300
Browning *v.* Dann, Bull. N. P. 81 - - - - 218
Buckley *v.* Kenyon, 10 East, 139 - - - - - 3
Buckley *v.* Taylor, 2 T. R. 600 - - - - 94, 168
Bull, Ex parte, Re Bew, 18 Q. B. D. 642; 56 L. T. N. S. 571 - 181
Bull *v.* Gibbs, 8 T. R. 327 - - - - - 116
Bull *v.* Parker, 2 Dowl. N. S. 345 - - - - - 295

PAGE

Buller's Case, 1 Leon. 50 - - - - 226, 229
Bunch *v.* Kennington, 1 Q. B. 679 - - - 139, 141, 302
Burne *v.* Richardson, 4 Taunt. 720 - - - 36, 43, 188
Burrell *v.* Jones, 3 B. & A. 47 - - - - - 102
Burt *v.* Moore, 5 T. R. 329 - - - - 298, 299
Buszard *v.* Capel, 8 B. & C. 144; 3 You. & Jer. 344; 2 Man. & Ryl. 197; 6 Bing. 150; 3 Moore & P. 480; 12 Moore, 339; 2 C. & P. 541 - - - - - - - 193
Butcher *v.* Butcher, 7 B. & C. 399 - - - - 300
Butler and Baker's Case, 3 Co. Rep. 22 b - - - 45, 46
Butt's Case, 7 Co. Rep. 23 - - - - - 3, 41
Buttery *v.* Robinson, 3 Bing. 392 - - - - 67, 68

C.

Cadogan *v.* Kennett, Cowp. 432 - - - - - 22
Cakeleigh *v.* Birch, 3 Camp. 521 (n.) - - - - 275
Calvert *v.* Jolly, 2 B. & Ad. 418 - - - - - 269
Camberwell Rent Charge, In re, 4 Q. B. 151; 12 L. J. Q. B. 155 72
Campbell *v.* Leach, Amb. 740 - - - - - 3
Campbell's (Sir Thos.) Case, Roll. Abr. tit. "Exon." (B.) - - 55
Cape *v.* Scott, L. R. 9 Q. B. 269; 43 L. J. Q. B. 65; 30 L. T. N. S. 87 - - - - - - 65, 299
Carey *v.* Mathews, 1 Salk. 191 - - - 85, 214, 350
Carnelley, Ex parte, In re Lancashire Cotton Spinning Co., 35 Ch. D. 656; 56 L. J. Ch. 761; 57 L. T. N. S. 511; 36 W. R. 305 - - - - - - -104, 110, 113
Carpenter *v.* Parker, 3 C. B. N. S. 237; 27 L. J. C. P. 78 - - 91
Carr *v.* Lambert, L. R. 1 Ex. 168 - - - - 66
Carriage Co-operative Supply Association, In re, Clemence, Ex parte, L. R. 23 Ch. D. 154; 48 L. T. N. S. 308 - - - 112
Carter *v.* Carter, 5 Bing. 406; 2 M. & P. 723 - -175, 176, 337
Carter *v.* Dean of Ely, 7 Sim. 211, 217 - - - - 85
Carter, Ex parte, Re Ware, L. R. 8 Ch. D. 731; 39 L. T. N. S. 185; 27 W. R. 106 - - - - - - 94
Carter *v.* Salmon, 43 L. T. N. S. 490 - - 11, 90, 295
Cartwright *v.* Smith, 1 Moo. & Rob. 284 - - - - 201
Castleman *v.* Hicks, 1 C. & M. 266 - - - - - 240
Cattley *v.* Arnold, 7 W. R. 245; 28 L. J. Ch. 352; Johns. & Hem. 651 - - - - - - - - - 26
Cawthorne *v.* Camp, 1 Aust. 212 - - - - - 346
Chamberlayn's Case, 1 Leon. 220; Owen, 124; Noy, 119 - 235
Chandler *v.* Doulton, 3 H. & C. 553; 34 L. J. Ex. 89 - - 340

PAGE

Chapman *v.* Beecham, 3 Q. B. 723; 12 L. J. Q. B. 42 - 66, 92
Chapman *v.* Bluck, 4 Bing. N. C. 187; 7 L. J. C. P. 100 - 10, 32
Charleton *v.* Alway, 11 Ad. & Ell. 993; 9 L. J. Q. B. 237 - 75
Chetham *v.* Williamson, 4 East, 469 - - - - - 12
Child *v.* Chamberlain, 3 N. & M. 520; 5 B. & Ad. 1049; 6 C. & P. 213 - - - - - 207, 247, 259, 262, 332
Church *v.* Imperial Gas Co., 6 Ad. & Ell. 861 - - - 86
Churchill *v.* Evans, 1 Taunt. 529 - - - - - 300
Churchwardens of Birmingham *v.* Shaw, 10 Q. B. 868 - - 379
Clark *v.* Calvert, 8 Taunt. 472 - - - - - 124
Clark *v.* Gaskarth, 8 Taunt. 431 - - - - - 124
Clarke *v.* Davies, 7 Taunt. 72 - - - - - 349
Clarke *v.* Holford, 2 C. & K. 540 - - 18, 123, 169, 247, 331
Clarke *v.* Milwall Dock Co., 17 Q. B. D. 494; 53 L. T. N. S. 316; 54 L. T. N. S. 814; 55 L. J. Q. B. 378; 34 W. R. 698; 51 J. P. 5; 2 T. L. R. 669 - - - - - 131
Clarke *v.* Waterton, 8 C. & P. 365; 2 M. & Rob. 87 - - 44
Clemence, Ex parte, In re Carriage Co-operative Supply Association, L. R. 23 Ch. D. 154; 48 L. T. N. S. 308 - - 103
Clement *v.* Milner, 3 Esp. 95 - - - - 196, 306
Clew, In re, L. R. 8 Q. B. D. 511; 30 W. R. 705 - - 399
Clowes *v.* Hughes, L. R. 5 Ex. 160; 39 L. J. Ex. 62; 22 L. T. N. S. 103 - - - - - - - - 88
Clun's Case, Shower, 79; 10 Co. Rep. 127; Tudor's L. C. Conv. 3rd ed. 310 - - - - - 22, 25, 56, 165, 167
Coal Consumers' Association, In re, L. R. 4 Ch. D. 625; 46 L. J. Ch. 501; 35 L. T. N. S. 729; 25 W. R. 300 - 93, 105, 106, 108
Cochrane, Ex parte, Re Mead, L. R. 20 Eq. 282; 44 L. J. Bktcy. 87; 32 L. T. N. S. 508; 23 W. R. 862 - - - 82, 94, 100
Cocker *v.* Musgrove, 9 Q. B. 230; 15 L. J. Q. B. 365; 10 Jur. 922 - - - - - - - - 270, 275
Cocks *v.* Gray, 26 L. J. Ch. 607; 1 Giff. 77; 3 Jur. N. S. 1115 - 210, 350
Cole *v.* Sury, Latch. 264 - - - - - - 165
Coll *v.* Bishop of Coventry, Hob. 140, 153 - - - 19
Collier *v.* Clarke, 5 Q. B. 467 - - - - - 373
Collier *v.* Nokes, 2 C. & K. 1013 - - - - - 185
Collins *v.* Harding, Cro. Eliz. 606 - - - - 22, 23
Collyer *v.* Speer, 2 B. & B. 67; 4 J. B. Moore, 573 - 271, 275
Concannen *v.* Lethbridge, 2 H. Bl. 40 - - - - 355
Coode *v.* Johns, 17 Q. B. D. 714; 55 L. J. Q. B. 475; 35 W. R. 47; 51 J. P. 21 - - - - - 251, 260, 347
Cook *v.* Cook, Andr. 219 - - - - - - 271
Cook *v.* Corbett, 24 W. R. 181 - - - - - 254
Cook *v.* Guerra, L. R. 7 C. P. 132 - - - - - 89

PAGE

Coomber *v.* Howard, 1 C. B. 440 - - - - 165, 166
Cooper *v.* Blandy, 3 L. J. C. P. 274 - - - - - 36
Corbet's Case, 4 Rep. 82 - - - - - - 55
Cornish *v.* Searall, 8 B. & C. 471 - - - - - 86
Corporation of Birmingham, Ex parte, In re National Arms and Ammunition Co., Limited, 28 Ch. D. 474; 54 L. J. Ch. 673; 52 L. T. N. S. 237 - - - - - - 110
Coster *v.* Wilson, 3 M. & W. 411 - - - - 205, 206
Cotesworth *v.* Spokes, 10 C. B. N. S. 103; 4 L. T. N. S. 214; 7 Jur. N. S. 803; 30 L. J. C. P. 220 - - - 38, 189
Cother *v.* Merrick, Hard. 95 - - - - - 13, 56
Cotsworth *v.* Bettison, 1 Ld. Raym. 105; 1 Salk. 247 - - 314
Coupland *v.* Maynard, 12 East, 134 - - - - - 37
Cowne *v.* Cordery, 10 W. R. 347 - - - - - 325
Cowper *v.* Fletcher, 6 B. & S. 464; 34 L. J. Q. B. 187; 12 L. T. N. S. 420 - - - - - - - 50, 60
Cox *v.* Bailey, 6 M. & G. 193; 6 Scott, N. R. 798 - - 218
Cox *v.* Bent, 5 Bing. 185; 2 M. & P. 281 - - - 10, 32
Cox *v.* Leigh, L. R. 9 Q. B. 333; 43 L. J. Q. B. 123; 30 L. T. N. S. 494; 22 W. R. 730 - - - - 187, 270
Cox *v.* Painter, 7 C. & P. 767 - - - - - 240
Crabb *v.* Killick, 3 C. & P. 216 - - - - 214, 332
Crabtree *v.* Robinson, L. R. 15 Q. B. D. 312 - - - 221
Cramer *v.* Mott, L. R. 5 Q. B. 357; 39 L. J. Q. B. 172; 22 L. T. N. S. 857 - - - - - - - 225
Cranley *v.* Kingswell, Hob. 207 - - - - - 182
Craven *v.* Ingham, 58 L. T. N. S. 486 - - - - 81
Croom *v.* Talbot, Comb. 238 - - - - - - 4
Cropper *v.* Warner, 1 C. & E. 152 - - - - 142
Crosier *v.* Tomkinson, 2 Ld. Ken. 439; Barnes, 472 - - 137
Cross *v.* Ayres, 1 F. & F. 187 - - - - - 263
Cross *v.* Jordan, 8 Exch. 149 - - - - - 191
Crowder *v.* Self, 2 Moo. & R. 190 - - - 171, 339
Crowther *v.* Ramsbotham, 9 East, 298; 7 T. R. 654 - 229, 334
Cuckson *v.* Winter, 2 Man. & Ry. 313 - - - 207, 330
Culley *v.* Spearman, 2 H. Bl. 386 - - - - 45, 301
Cumming *v.* Bedborough, 15 M. & W. 438 - - - 176
Curtis *v.* Wheeler, Moo. & M. 493 - - - - - 43
Cutting *v.* Cooper, 2 Wils. 375 - - - - - 41
Cutting *v.* Derby, 2 W. Bl. 1077 - - - - - 164

D.

PAGE

Dalton *v.* Whittem, 3 Q. B. 961; 3 G. & D. 260; 12 L. J. Q. B. 55 - - - - - - - 123, 330
Danby *v.* Watson, 36 L. T. N. S. 412; 41 J. P. 406 - - - 377
Dancer *v.* Hastings, 4 Bing. 2; 12 Moore, 34 - - 79, 80, 88
Daniel *v.* Gracie, 6 Q. B. 145; 13 L. J. Q. B. 309 - - - 5, 33
Daniel *v.* Stepney, L. R. 9 Ex. 185; 41 L. J. Ex. 208; 27 L. T. N. S. 380; 22 W. R. 662 - - - - - 192
Darby *v.* Harris, 1 Q. B. 895; 10 L. J. Q. B. 294; 1 G. & D. 234; 5 Jur. 988 - - - - - - - - 121
Dargan *v.* Davies, L. R. 2 Q. B. D. 118; 46 L. J. Q. B. D. 122- 231
Darnton *v.* Pigman, Peake Add. Ca. 111- - - - 96
Darrell *v.* Wilson, Cro. Eliz. 644 - - - - -12, 56
Davies *v.* Aston, 1 C. B. 746; 14 L. J. C. P. 228- - - 147
Davies *v.* Edmonds, 12 M. & W. 31; 1 D. & L. 395- - 271, 276
Davies *v.* Gyde, 2 A. & E. 623; 4 N. & M. 462 - - - 285
Davies *v.* Pedley, 3 L. J. C. P. 120 - - - - - 386
Davies *v.* Powell, Willes, 46; 7 Mod. 249 - - 141, 348
Davis, Ex parte, In re Pollen's Trustees, 54 L. T. N. S. 304; 55 L. J. Q. B. 217; 2 T. L. R. 229 - - 142, 143, 268, 271, 272
Davis & Co., In re, Ex parte Rawlings, W. N. 1888, p. 236 - 40, 68, 92
Dawe *v.* Cloud, 14 L. T. N. S. 155 - - - - 208
Dawson *v.* Cropp, 14 L. J. C. P. 281; 1 C. B. 961; 3 D. & L. 225 - - - - - -172, 286, 288, 290
Dawson *v.* Robins, L. R. 2 C. P. D. 38 - - - - 69
Day *v.* King, 5 L. J. M. C. 130 - - - - - 407
Dean of Christ Church, Oxford *v.* Duke of Buckingham, 33 L. J. C. P. 322; 17 C. B. N. S. 391 - - - - 90, 210, 362
Dean of Ely *v.* Cash, 15 M. & W. 617 - - - - 179
Dean and Chapter of Rochester *v.* Pierce, 1 Camp. 466 - - 85
Delaney *v.* Fox, 2 C. B. N. S. 768 - - - - - 91
De Nicholls *v.* Saunders, L. R. 5 C. P. 589; 22 L. T. N. S. 661-89, 170
Dennis *v.* Bosden, 1 And. 253 - - - - - 182
Descharmes, Ex parte, 1 Atk. 103 - - - - - 94
Dethick *v.* Bradhorn, 2 Sid. 110, 117 - - - - 182
Devine, Ex parte, Cooke, 216 - - - - - 94
Dibble *v.* Bowater, 2 E. & B. 564; 22 L. J. Q. B. 396 -164, 185, 199
Dighton *v.* Greenvil, 2 Vent. 327 - - - - - 55
Dix *v.* Groom, L. R. 5 Ex. D. 91; 49 L. J. Ex. 430 - - 373
Dixon *v.* Harrison, Vaughan, 52 - - - 40, 46, 47, 59
Dixon *v.* James, 4 Burr. 2431; 2 Lutw. 1241; Freeman, 273 - 64, 299
Dixon *v.* Smith, 1 Swanst. 457 - - - - - 268
Dobson, Ex parte, 7 Vin. Abr. 74 - - - - - 103

PAGE

Dodd *v.* Morgan, 6 Mod. 215 - - 224, 230, 310, 314, 322
Dodd *v.* Saxby, 2 Stra. 1024 - - - - - 268
Dodds *v.* Thompson, L. R. 1 C. P. 133; Har. & Rut. 319 - 20, 68, 69
Doe *d.* Angell *v.* Angell, 9 Q. B. 328 - - - - 179
Doe *d.* Bailey *v.* Foster, 3 C. B. 215 - - - - - 86
Doe *d.* Barber *v.* Lawrence, 4 Taunt. 23 - - - - 12
Doe *d.* Cheney *v.* Batten, Cowp. 243 - - - - - 284
Doe *d.* Chippingdale *v.* Dyson, 1 Moo. & M. 77 - - - 192
Doe *d.* Cox *v.* Roe, 5 D. & L. 272 - - - - - 192
Doe *d.* David *v.* Williams, 7 C. & P. 322 - - - 188, 189, 190
Doe *d.* Edney *v.* Billett, 7 Q. B. 976 - - - - - 2, 33
Doe *d.* Flower *v.* Peck, 1 B. & Ad. 436 - - - - 189
Doe *d.* Garrod *v.* Olley, 12 Ad. & Ell. 481 - - - - 92
Doe *d.* Haverson *v.* Franks, 2 C. & K. 678 - - 191, 192
Doe *d.* Higginbotham *v.* Barton, 11 A. & E. 314 - - - 91
Doe *d.* Holmes *v.* Darby, 8 Taunt. 538 - - - - 190
Doe *d.* Marriott *v.* Edwards, 5 B. & Ad. 1065; 3 N. & M. 193 - 91
Doe *d.* Palk *v.* Marchetti, 1 B. & Ad. 715 - - - - 43
Doe *d.* Pearson *v.* Ries, 8 Bing. 181; 1 M. & Sc. 264 - - 10
Doe *d.* Powell *v.* Roe, 9 Dowl. 548 - - - - - 191
Doe *d.* Robinson *v.* Hinde, 2 Moo. & R. 441 - - - 2
Doe *d.* Smelt *v.* Fuchau, 15 East, 286 - - - - 192
Doe *d.* Snell *v.* Tom, 4 Q. B. 615 - - - - - 92
Doe *d.* Wheeldon *v.* Paul, 3 C. & P. 613 - - - - 165
Doe *d.* Wilkinson *v.* Goodier, 10 Q. B. 957 - - -88, 92
Doe *d.* Wyatt *v.* Byron, 1 C. B. 623 - - - - - 191
Doe *v.* Batten, Cowp. 243 - - - - - 190
Doe *v.* Bucknell, 8 C. & P. 566 - - - - - 91
Doe *v.* Davies, 7 Exch. 89 - - - - - 88
Doe *v.* Mitchell, 1 Brod. & B. 11 - - - - - 50
Doe *v.* Walker, 3 B. & C. 111 - - - - - 41
Doe *v.* Wandlass, 7 T. R. 117 - - - - 164, 191
Doubitofte *v.* Curteen, Cro. Jac. 452 - - - - 4
Drake *v.* Mitchell, 3 East, 251 - - - - - 286
Draper *v.* Thompson, 4 C. & P. 84 - - - 216, 224
Druce *v.* Bailey, 1 Vent. 275 - - - - - - 57
Dry Docks Corporation of London, In re, 59 L. T. N. S. 295, 763; 4 T. L. R. 666; 39 Ch. Div. 306; 37 W. R. 18; 58 L. J. Ch. 33 - 110
Duchy of Lancaster's Case, 4 Inst. 209; Plowd. 221 - - 84
Duck *v.* Braddyll, 13 Price, 455; M'Clel. 217 - 122, 269, 271, 273
Dumergue *v.* Rumsey, 2 H. & C. 777; 33 L. J. Ex. 88 - - 120
Dumpor's Case, Sm. L. Cas. 8th ed. 61 - - - - 189
Duncan *v.* Meicleham, 3 C. & P. 172 - - - - 214

PAGE

Duncomb *v.* Reeve, Cro. Eliz. 783 - - - - 235
Dunk *v.* Hunter, 5 B. & Ald. 322 - - - - - 8, 29
Duppa *v.* Mayo, 1 Saund. 287; 2 Salk. 578 - - 164, 165
Dyer *v.* Bowley, 2 Bing. 94 - - - - - - 175

E.

Eagleton *v.* Gutteridge, 11 M. & W. 465; 2 Dowl. N. S. 1053; 12 L. J. Ex. 359 - - - - - 36, 82, 222
Easton Estate and Mining Co. *v.* Western Waggon and Property Co., 54 L. T. N. S. 735; 50 J. P. 790 - - - - 154
Eaton *v.* Southby, Willes, 131 - - - - - 139
Eatough, Ex parte, Re Cliffe, 42 L. T. N. S. 95 - - -82, 94
Ecclesiastical Commissioners of Ireland *v.* O'Connor, 9 Ir. C. L. R. 242 - - - - - - - - 34
Edgson *v.* Cardwell, L. R. 8 C. P. 647; 28 L. T. N. S. 819 - 364
Edmonds *v.* Challis, 7 C. B. 413; 18 L. J. C. P. 164- - 344, 356
Edmonds *v.* Eastwood, 2 H. & N. 826 - - - - 5
Edmondson *v.* Nuttall, 17 C. B. N. S. 280 - - 185, 194, 322
Efford *v.* Burgess, 1 Moo. & Rob. 23 - - - - 254
Eldridge *v.* Stacey, 15 C. B. N. S. 458; 12 W. R. 51; 9 L. T. N. S. 291 - - - - - 221, 222
Elliott, Ex parte, 3 M. & A. 664; 3 Dea. 343 - - - 96
Ellis *v.* Rowles, Willes, 638 - - - - - 299
Ellis *v.* Taylor, 8 M. & W. 415; 10 L. J. Ex. 462 - - - 294
Emott's Case, Dyer, 212 b - - - - - 22
England *v.* Cowley, L. R. 8 Ex. 126; 42 L. J. Ex. 80; 28 L. T. N. S. 67; 21 W. R. 337 - - - - - - 225
Esdaile *v.* Payne, W. N. 1886, p. 35; 59 L. T. N. S. 568; 33 Sol. J. 107; 13 App. Cas. 613 - - - - - 179
Etherton *v.* Popplewell, 1 East, 142 - - 229, 252, 327, 335
Evans *v.* Brander, 2 H. Bl. 547 - - - - - 355
Evans *v.* Elliott, 9 L. J. Q. B. 51; 5 A. & E. 142; 9 A. & E. 342 91, 293, 345, 361
Evans *v.* Mathias, 7 El. & Bl. 590; 26 L. J. Q. B. 309 - - 80
Evans *v.* Wright, 2 H. & N. 527; 27 L. J. Ex. 50 263, 264, 265, 325
Ewer *v.* Lady Clifton, Bull. N. P. 182 - - - - 285
Ewer *v.* Moyle, Cro. Eliz. 771 - - - - - 23
Exhall Mining Company, In re, 4 D. J. & S. 377 - - - 108

F.

Fabian & Windsor's Case, 1 Leon. 305 - - - - 164
Fairfax *v.* Gray, 2 W. Bl. 1326 - - - - - 66
Fairfax *v.* Lord Derby, 2 Vern. 612 - - - - 59

PAGE

Fanshawe, Re, Ex parte Birmingham & Staff. Gas Co., 11 Eq. 615; 40 L. J. Bkcy. 52; 19 W. R. 603; 24 L. T. N. S. 639 95, 100
Farrance *v.* Elkington, 2 Camp. 591 - - - - 178
Farrant *v.* Robson, 3 L. J. C. P. 146- - - - - 135
Fell *v.* Whittaker, L. R. 7 Q. B. 120; 41 L. J. Q. B. 78; 25 L. T. N. S. 880 - - - - - -337, 349, 361
Fenton *v.* Logan, 9 Bing. 676; 2 L. J. C. P. 102 - 140, 150, 349
Field *v.* Adames, 12 Ad. & Ell. 649; 10 L. J. Q. B. 2 - 139, 302
Field *v.* Mitchell, 6 Esp. 71 - - - - - 335, 339
Field *v.* Newport Ry. Co., 27 L. J. Ex. 396 - - - 183
Fife *v.* Bousfield, 8 Q. B. 100; 13 L. J. Q. B. 306; 2 D. & L. 481; 8 Jur. 734 - - - - - - - 237
Finch *v.* Miller, 5 C. B. 428 - - - - - 295
Findon *v.* McLaren, 6 Q. B. 891; 14 L. J. Q. B. 183 - - 134
Firth *v.* Purvis, 5 T. R. 432 - - - 240, 294, 314, 316
Fisher *v.* Algar, 2 C. & P. 374 - - - - 254, 339
Flesher *v.* Trotman, 2 L. T. N. S. 508; 6 L. T. N. S. 218 -41, 46
Fletcher *v.* Marillier, 9 Ad. & Ell. 457 - - - - 200
Fletcher *v.* Saunders, 6 C. & P. 747; 1 Moo. & Rob. 375 - 246
Fletcher *v.* Wilkins, 6 East, 283 - - - - - 348
Ford *v.* Tynte, 31 L. J. Ch. 177 - - - - - 141
Fordham *v.* Akers, 4 B. & S. 578; 33 L. J. Q. B. 67; 9 L. T. N. S. 478; 12 W. R. 201 - - - - - 356, 359
Forster *v.* Cookson, 1 Q. B. 419; 1 G. & D. 61 - - 269, 273
Foss, Ex parte, 2 De G. & J. 230 - - - - - 100
Foss *v.* Racine, 4 M. & W. 419 - - - - - 201
Foster *v.* Hilton, 1 Dowl. 35 - - - - - - 275
Foulget *v.* Taylor, 5 H. & N. 202; 1 L. T. N. S. 481 - 200, 279
Fowkes *v.* Joyce, 3 Lev. 260; 2 Wms. Saund. 290; 2 Vern. 129 - 128, 130, 284
Fox *v.* Vaughan, Het. 86 - - - - - 182
Francis *v.* Wyatt, 3 Burr. 1498; 1 W. Bl. 483 - - - 128
Franklin *v.* Carter, 1 C. B. 750; 3 D. & L. 213 - - 38, 176
Fraser *v.* Swansea Canal Co., 1 Ad. & Ell. 354 - - - 132
Freeman *v.* Edwards, 2 Exch. 732; 17 L. J. Ex. 258 - 68, 88, 92
Freeman *v.* Rosher, 6 D. & L. 517; 13 Q. B. 780; 18 L. J. Q. B. 340; 13 Jur. 881 - - - - - 82, 208, 324
French *v.* Phillips, 1 H. & N. 564; 26 L. J. Ex. 82 - - 171
Frusher *v.* Lee, 10 M. & W. 709; 12 L. J. Ex. 321 - - 145, 255
Fryman's Estate, In re, 38 Ch. D. 468; 57 L. J. Ch. 862; 36 W. R. 631; 58 L. T. N. S. 872 - - - - - 96
Fuller, Ex parte, 2 D. & L. 98; 13 L. J. M. C. 142; 8 Jur. 604 206
Furley *v.* Wood, 1 Esp. 198 - - - - - 85
Furneaux *v.* Fotherby, 4 Camp. 135 - - - 198, 200, 333

G.

PAGE

Gage *v.* Collins, L. R. 2 C. P. 381; 36 L. J. C. P. 144 - - 279
Gale *v.* Wilks, 2 Dowl. Rep. 189 - - - - - 268
Galloway *v.* Bird, 4 Bing. 299; 12 Moore, 547 - - 345, 361
Gambrell *v.* Earl of Falmouth, 5 Ad. & Ell. 403; 4 Ad. & Ell. 73- 172, 287, 333
Gardiner *v.* Williamson, 2 B. & Ad. 336 - - - 5, 33, 75
Gargrove *v.* Smith, 1 Salk. 221 - - - - - 307
Garnett *v.* Bradley, L. R. 3 Ap. Cas. 970 - - - 317
Gaslight & Coke Co. *v.* Hardy, 17 Q. B. D. 619; 55 L. T. N. S. 585; 2 T. L. R. 851 - - - - - - 120, 156
Gaslight & Coke Co. *v.* Herbert Smith & Co., 3 T. L. R. 15 - 120, 156
Gates *v.* Bayley, 2 Wils. 313 - - - - - 235
Gauntlett *v.* King, 3 C. B. N. S. 59 - - - 120, 208, 324
Gawler *v.* Chaplin, 2 Exch. 503, 507 - - - 274, 275
Gay *v.* Mathews, 4 B. & S. 425; 32 L. J. M. C. 58; 7 L. T. N. S. 504 - - - - - - - - 348
General Share Co. *v.* Whetley, L. R. 20 Ch. D. 260 - - 111
Gent *v.* Cutts, 11 Q. B. 288; 17 L. J. Q. B. 55 - - - 358
George *v.* Chambers, 2 Dowl. N. S. 783; 11 M. & W. 149; 7 Jur. 836; 12 L. J. M. C. 94 - - - - 344, 346
Gethin *v.* Wilks, 2 Dowl. Rep. 189 - - - - 94, 268
Gibbs *v.* Cruikshank, L. R. 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. N. S. 104 - - - - - 88, 362, 367
Gibbs *v.* Stead, 8 B. & C. 528; 2 Man. & Ry. 547 - - - 377
Gibson *v.* Ireson, 3 Q. B. 39 - - - - 125, 126
Gilbertson *v.* Richards, 5 H. & N. 453; 29 L. J. Ex. 213; 6 Jur. N. S. 672 - - - - - - - - 69, 70
Giles *v.* Spencer, 3 C. B. N. S. 244; 26 L. J. C. P. 237 - 36, 151, 283
Gilham *v.* Arkwright, 16 L. T. N. S. 88 - - - - 199
Gillingham *v.* Gwyer, 16 L. T. N. S. 640 - - - 194
Gilman *v.* Elton, 3 B. & B. 75; 6 Moore, 243 - - 126, 134
Gimbart *v.* Pelah, 2 Stra. 1272 - - - - - 237
Gingell *v.* Turnbull, 3 Bing. N. C. 881 - - - - 372
Gisbourn *v.* Hurst, 1 Salk. 249 - - - - - 126
Gladman *v.* Plumer, 15 L. J. Q. B. 79; 10 Jur. 109 - - 36
Glover *v.* Coles, 1 Bing. 6; 7 Moore, 231; 2 B. & B. 367 - 124
Glyn *v.* Thomas, 11 Exch. 870; 25 L. J. Ex. 125 - - 171, 340
Goodman *v.* Ayling, Yelv. 148 - - - - - 361
Goodwin *v.* Cheveley, 4 H. & N. 631; 28 L. J. Ex. 298 - - 304
Gore *v.* Goston, 1 Stra. 643 - - - - - 271
Gore *v.* Lloyd, 12 M. & W. 463 - - - - - 166
Gorton *v.* Falkner, 4 T. R. 567 - - - - 121, 140, 150

PAGE

Gouge *v.* Hayward, Bridgm. 54 - - - - - 62
Gould *v.* Bradstock, 4 Taunt. 562 - - - - 218
Gouldsworth *v.* Elliott, 11 M. & W. 337 - - - - 86
Governors of Bristol Poor *v.* Wait, 1 Ad. & Ell. 264; 3 L. J. M. C. 71 - - - - - - - 382
Governors of Christ's Hospital *v.* Harrild, 2 M. & G. 713 - - 17
Grace *v.* Morgan, 5 L. J. C. P. 180 - - - - 372
Graham *v.* Allsopp, 3 Exch. 186; 18 L. J. Ex. 85 - - - 174
Graham *v.* Tate, 1 M. & S. 609 - - - - - 263
Grant *v.* Ellis, 9 M. & W. 113 - - - - - 179
Gravenor *v.* Woodhouse, 2 Bing. 71; 9 Moore, 148 - - 349
Gray *v.* Chamberlain, 4 C. & P. 260 - - - - - 165
Gray *v.* Stait, L. R. 11 Q. B. D. 668; 52 L. J. Q. B. 412; 49 L. T. N. S. 288 - - - - - - 53, 187, 201
G. E. Rail. Co. *v.* Harwich (Mayor, &c.), 41 L. T. N. S. 533; 44 J. P. 104 - - - - - - - 29, 133
Green *v.* Austin, 3 Camp. 260 - - - - - 269
Green *v.* Duckett, L. R. 11 Q. B. D. 275; 52 L. J. Q. B. 435; 48 L. T. N. S. 677 - - - - - - - 309
Green *v.* St. Katherine's Dock Co., 19 L. J. Q. B. 53; 13 Jur. 1116 - - - - - - - - - 133
Green *v.* Wise, W. N. 1877, p. 130 - - - - - 324
Green *v.* Wroe, W. N. 1877, p. 130 - - - - 208
Griffin *v.* Scott, 2 Ld. Raym. 1424; 2 Stra. 717 - - - 252
Griffiths *v.* Chichester, 7 Exch. 95, n. (a); 21 L. J. Ex. 290, n. (3) 286
Griffiths *v.* Puleston, 13 M. & W. 358 - - - - 186
Griffiths *v.* Stevens, 1 Chit. Rep. 196 - - - - 346
Grimwood *v.* Moss, L. R. 7 C. P. 360; 41 L. J. C. J. 239 - - 189
Groom *v.* Bluck, 2 M. & G. 567; 2 Scott, N. R. 89 - - 216
Grove, Ex parte, 1 Atk. 104 - - - - - - - 99
Groves *v.* D'Acastro, Bunb. 194 - - - - - 267
Guardians of Poor of Woodbridge Union *v.* Guardians of Carlford Union, 13 Q. B. 269; 18 L. J. Q. B. 126 - - - 30
Guardians of Tynemouth Union *v.* Guardians of Backworth Union, 59 L. T. N. S. 178 - - - - - - 384
Gulliver *v.* Cosens, 1 C. B. 788; 14 L. J. C. P. 215 - 308, 337
Gwilliam *v.* Barker, 1 Price, 274 - - - - - 272
Gwillim *v.* Holbrook, 1 Bos. & Pul. 410 - - - - 358

H.

Haines *v.* Welch and Marriott, L. R. 4 C. P. 91; 38 L. J. C. P. 118; 19 L. T. N. S. 422 - - - - - 45, 186
Hale, Ex parte, Re Binns, L. R. 1 Ch. D. 285; 45 L. J. Bktcy. 21; 24 W. R. 300; 33 L. T. N. S. 706 - - - 18, 94

PAGE

Hall *v.* Butler, 10 A. & E. 204 - - - - - 86
Hall *v.* Comfort, 18 Q. B. D. 11 - - - - - 101
Hall *v.* Harding, 1 W. Bl. 673; 4 Burr. 2426 - - 64, 298, 299
Hammerton *v.* Stead, 3 B. & C. 483 - - - - 6, 8, 271
Hammond *v.* Bendyshe, 13 Q. B. 869 - - - - 408
Hammond *v.* Mather, 3 F. & F. 151 - - - - - 192
Hampson *v.* Fellows, L. R. 6 Eq. 578; 19 L. T. N. S. 6 - - 88
Hancock *v.* Austin, 14 C. B. N. S. 634; 32 L. J. C. P. 252; 8 L. T. N. S. 429 - - - - 5, 9, 30, 34, 35, 194, 219
Hancock *v.* Caffyn, 1 L. J. C. P. 104 - - - - 103
Handcock *v.* Foulkes, 9 M. & W. 431; 11 L. J. Ex. 381; 1 Dowl. Rep. N. S. 658 - - - - - - 333
Hanmer *v.* King, 20 Q. B. D. 422; 57 L. T. N. S. 367 - - 150
Harding *v.* Hall, 14 L. T. N. S. 410; 14 W. R. 14 - - 262
Harris, Ex parte, 16 Q. B. D. 130 - - - - - 162
Harris *v.* Shipway, Bull. N. P. 182 - - - - 285
Harris *v.* Thirkell, 20 L. T. 98 - - - - - 202
Harrison, Ex parte, Re Betts, L. R. 18 Ch. D. 127; 50 L. J. Ch. 832; 45 L. T. N. S. 290; 30 W. R. 38 - - - - 98
Harrison, Ex parte, Re Peake, L. R. 13 Q. B. D. 753; 53 L. J. Ch. 977 - - - - - - - 95, 100
Harrison *v.* Barnby, 5 T. R. 246 - - - - - 50
Harrison *v.* Barry, 7 Price, 690 - - - 17, 169, 253, 271
Harrison *v.* Wardle, 5 B. & Ad. 153 - - - - 358
Hart *v.* Leach, 1 M. & W. 560; 2 Gale, 172; Tyr. & Gr. 1010; 5 L. J. Ex. 244 - - - - 209, 259, 262, 331
Hartley *v.* Moxham, 3 Q. B. 701 - - - - - 225
Harvey *v.* Pocock, 11 M. & W. 740; 12 L. J. Ex. 434 - - 322
Haseler *v.* Lemoyne, 5 C. B. N. S. 530; 28 L. J. C. P. 103 82, 208, 209, 324
Hatch *v.* Hale, 15 Q. B. 10; 19 L. J. Q. B. 289; 14 Jur. 459 - 82, 215, 292
Hawkins *v.* Walrond, L. R. 1 C. P. D. 280; 45 L. J. C. P. D. 772; 35 L. T. N. S. 210 - - - - 145, 255
Hayward *v.* Haswell, 6 Ad. & Ell. 265 - - - - 31
Heawood *v.* Bone, L. R. 13 Q. B. D. 179 - - - - 160
Hefford *v.* Alger, 1 Taunt. 218 - - - - 291, 372
Hegan *v.* Johnson, 2 Taunt. 148 - - - - - 8, 30
Hellawell *v.* Eastwood, 6 Exch. 295; 20 L. J. Ex. 154 - 121, 122, 344, 356
Henchett *v.* Kimpson, 2 Wils. 140 - - - 267, 269, 273
Heysham *v.* Heskett, Ex parte Arnison, L. R. 3 Ex. 56; 37 L. J. Ex. 57; 17 L. T. N. S. 480 - - - - 73, 259
Hickman *v.* Machin, 4 H. & N. 722 - - - - 88

PAGE

Hill, Ex parte, Re Roberts, L. R. 6 Ch. D. 63; 46 L. J. Bktcy. 116; 25 W. R. 784; 37 L. T. N. S. 46 - - - 95, 100
Hill *v.* Grange, Plowden, 171 - - - - - 167
Hill *v.* Saunders, 2 Bing. 112; 4 B. & C. 529 - - - 54
Hill's Case, 4 Leon. 187 - - - - - - 171
Hills *v.* Street, 5 Bing. 39 - - - - 259, 261, 331
Hilton *v.* Hankesson, 27 L. T. N. S. 519- - - - 305
Hindle *v.* Blades, 5 Taunt. 224 - - - - - 355
Hoare *v.* Lee, 17 L. J. C. P. 196; 5 C. B. 754; 5 D. & L. 765; 12 Jur. 356 - - - - - - - 323
Hoby *v.* Roebuck, 2 Marsh, 433 - - - - - 42
Hodeson *v.* Gresil, Yelv. 104 - - - - - 299
Hodges *v.* Lawrance, 18 J. P. 347 - - - - - 195
Hodgkinson *v.* Snibson, 3 Bos. & Pul. 603 - - - 366
Hodgson *v.* Gascoyne, 5 B. & Ald. 88 - - - - 270
Holgate *v.* Kay, 1 C. & K. 341 - - - - - 33
Holland *v.* Bird, 3 M. & S. 363; 10 Bing. 15 - - 292, 336
Holland *v.* Hodgson, L. R. 7 C. P. 328, 337; 41 L. J. C. P. 146, 150 - - - - - - - - 123
Holland *v.* Palser, 2 Stark. 161 - - - - 18, 168
Hood *v.* Bell, 1 Ld. Raym. 172; 3 Salk. 136 - - - 58
Hopcraft *v.* Keys, 9 Bing. 613; 2 M. & Scott, 760 - 30, 37, 115, 282
Hopkins *v.* Helmore, 8 A. & E. 463; 3 Nev. & P. 452 - 18, 168
Hopkins *v.* Shrole, 1 Bos. & Pul. 382 - - - - 368
Horne *v.* Lewin, Ld. Raym. 639, 641 - - - - 182
Horsefall *v.* Davy, Holt. 147; 1 Stark. 169 - - - - 205
Horsford *v.* Webster, 1 Cr. M. & R. 696; 4 L. J. Ex. 100; 5 Tyr. 409 - - - - - - 151, 283
Hoskins *v.* Knight, 1 M. & S. 245 - - - - - 271
Hoskins *v.* Robins, 2 Saund. 328- - - - 298, 301
Howe *v.* Scarrott, 4 H. & N. 723; 28 L. J. Ex. 325 - 54, 78
Hudd *v.* Ravenor, 2 B. & B. 662; 5 Moore, 542 - - 249, 290
Hudson *v.* Snelgar, 2 Roll. Rep. 212 - - - - 51
Hughes *v.* Browne, 7 Ir. L. R. 492 - - - - 334
Hughes *v.* Hughes, 3 Bro. Cha. Ca. 87 - - - - 80
Humberstone *v.* Dubois, 10 M. & W. 765 - - - 178
Humfrey *v.* Gery, 7 C. B. 567 - - - - - 178
Hunt *v.* Round, 2 Dowl. 558 - - - - - 373
Hunter *v.* Nockold, 1 Mac. & Gor. 640; 1 Hall & Tw. 644 - - 178
Huntley *v.* Roper, 1 And. 21 - - - - 21, 23
Hurrell *v.* Wink, 8 Taunt. 369 - - - - - 376
Hurry *v.* Rickman, 1 Moo. & Rob. 126 - - 82, 209, 324, 332
Hutchins *v.* Chambers, 1 Wm. Saund. 201, n. (1); 1 Burr. 589 - 172, 173, 174, 287, 289, 334

PAGE

Hutchins *v.* Scott, 2 M. & W. 809; 6 L. J. Ex. 186 - 166, 224
Hutt *v.* Morrell, 11 Q. B. 425, 438; 16 L. J. Q. B. 240; 11 Jur. 347; 12 Jur. 352 - - - - - - - 145

I.

Ibbett *v.* De la Salle, 6 H. & N. 233; 30 L. J. Ex. 44 - - 218
Incop *v.* Moorchurch, 2 F. & F. 501 - - - - 199
Iredale *v.* Kendall, 40 L. T. N. S. 362 - - - - 312
Ireland *v.* Johnson, 1 Bing. N. C. 162; 4 M. & Scott, 706 - - 329
Iremonger *v.* Newsom, Latch. 261 - - - - 114
Irish Land Commission *v.* Grant, 52 L. T. N. S. 228 - - 179

J.

Jackson, Ex parte, Re Bowes, L. R. 14 Ch. D. 725; 43 L. T. N. S. 272; 29 W. R. 253 - - - - - 97, 100, 101
Jackson *v.* Hanson, 8 M. & W. 479; 10 L. J. Ex. 396; 1 Dowl. Rep. N. S. 69 - - - - - - - 357
Jacob *v.* King, 1 Marsh. 135; 5 Taunt. 451 - - 248, 347
Jacobsohn *v.* Blake, 6 M. & G. 919 - - - - - 322
James *v.* Salter, 3 Bing. N. C. 505; 5 L. J. C. P. 112; 6 L. J. C. P. 171 - - - - - - - 67, 180
Jamieson *v.* Trevylyan, 10 Exch. 748; 24 L. J. Ex. 74 - - 365
Jeffery *v.* Bastard, 4 Ad. & Ell. 823 - - - - - 355
Jemott *v.* Cowley, 1 Saund. 113 - - - - - 15
Jenkins *v.* Biddulph, 4 Bing. 160; 5 L. J. C. P. 138 - - 372
Jenkins *v.* Cooke, 1 Ad. & Ell. 372 - - - - 132
Jenner *v.* Clegg, 1 Moo. & Rob. 213 - - - 18, 33, 38, 168
Jenner *v.* Whitehouse, Moo. & Rob. 213 - - - - 190
Jenner *v.* Yolland, 2 Chit. 167; 6 Price, 5 - - - 147, 255
Jennyngs *v.* Playstowe, Cro. Jac. 568 - - - - 314
Jenson *v.* Dixon, 1 M. & S. 601 - - - - - 277
Jew *v.* Thirkwell, 1 Ch. Cas. 31 - - - - - 22
Jewel's Case, 5 Rep. 3 - - - - - - - 13
John *v.* Jenkins, 1 Cromp. & M. 227; 2 L. J. Ex. 83 - 36, 198, 199
Johnson *v.* Barnes, L. R. 7 C. P. 592 - - - - 65
Johnson *v.* Faulkner, 2 Q. B. 925 - - - - 138
Johnson *v.* Jones, 9 A. & E. 809 - - - - - 175
Johnson *v.* Upham, 2 El. & El. 250; 28 L. J. Q. B. 253; 5 Jur. N. S. 681 - - - - - - 254, 294

PAGE
Johnstone *v.* Hudlestone, 7 D. & R. 411; 4 B. & C. 922 - 39, 178
Jolly *v.* Arbuthnot, 4 De G. & J. 224; 28 L. J. Ch. 547; 5 Jur. N. S. 689 - - - - - - 80, 88
Jones *v.* Bright, 5 Bing. 533 - - - - - - 214
Jones *v.* Buckley, 2 Jur. 204 - - - - 216, 332
Jones *v.* Carter, 15 M. & W. 718 - - - - - 38
Jones *v.* Gooday, 9 M. & W. 736 - - - - 327
Jones *v.* Hamp, 10 M. & W. 700 - - - - 145, 255
Jones *v.* Johnson, 7 Exch. 452; 21 L. J. M. C. 102; L. M. & P. 177 - - - - - - - 348, 350
Jones *v.* Jones, 3 B. & Ad. 967 - - - - - 58
Jones *v.* Morris, 18 L. J. Ex. 477 - - - - 174
Jones *v.* Williams, 11 A. & E. 643; 1 H. & H. 348 - - 200, 333
Josselin *v.* Josselin, 4 Leon. 19 - - - - - 167
Joule *v.* Jackson, 7 M. & W. 450; 10 L. J. Ex. 142 - - - 133
Jusan *v.* Dixon, 1 M. & S. 601 - - - - - 114

K.

Keane *v.* Dee, 1 Alcock & Napier, 496, n. (Irish) - - - 61
Kearsley *v.* Phillips, L. R. 11 Q. B. D. 621; 52 L. J. Q. B. 581; 31 W. R. 909; 49 L. T. N. S. 435 - - - - 98
Keating *v.* Irish, Lutw. 229 - - - - - - 294
Keech *v.* Hall, 1 Dougl. 21 - - - - - 92
Keen *v.* Priest, 4 H. & N. 236; 28 L. J. Ex. 157; 7 W. R. 376; 32 L. T. N. S. 131 - - - - 147, 314, 321
Keightley *v.* Birch, 3 Camp. 524 - - - - - 276
Kemp *v.* Cruwes, 2 Lutw. 1573 - - - - - 303
Kendall *v.* Wilkinson, 4 E. & B. 680; 24 L. J. M. C. 89- - 403
Kennard, Ex parte, 21 L. T. N. S. 684 - - - 96, 99
Kennedy, Ex parte, In re Willis, 21 Q. B. D. 384; 58 L. T. N. S. 892; 59 L. T. N. S. 749; 36 W. R. 639, 793; 4 T. L. R. 550 - 101
Kerby *v.* Harding, 6 Exch. 234; 20 L. J. Ex. 163 - - 223, 228
Kerry *v.* Derrick, Cro. Jac. 104 - - - - - 62
Kidwelly *v.* Brand, Plowden, 69 - - - - - 182
Kind *v.* Ammery, Hutton, 23 - - - - - 181
King *v.* England, 4 B. & S. 782; 33 L. J. Q. B. 145; 9 L. T. N. S. 645 - - - - - - - 248, 254
Kinrick *v.* Pargiter, Yelv. 129 - - - - - 299
Knibbs *v.* Hall, 1 Esp. 84 - - - - - - 308
Knight *v.* Bennett, 3 Bing. 361; 11 Moore, 227 7, 32, 39, 186, 194
Knight *v.* Cox, 25 L. J. C. P. 314; 18 C. B. 645- - - 177

PAGE

Knight *v.* Egerton, 7 Exch. 407 - - - 248, 264, 330
Knight's Case, Moore, 202; Co. Rep. 54 - - - 5, 171
Knowles *v.* Blake, 5 Bing. 499; 3 M. & P. 214 - - - 312

L.

Lackington *v.* Elliott, 7 M. & G. 538; 13 L. J. C. P. 153 - - 103
Ladd *v.* Thomas, 12 Ad. & Ell. 117; 9 L. J. Q. B. 345 - 294, 308
Lake *v.* Dean, 28 Beav. 607 - - - - - - 34
Lamb *v.* Mills, 4 Mod. 378 - - - - - 214
Lamb *v.* Wall, 1 F. & F. 503 - - - - - - 185
Lambert *v.* Austin, Cro. Eliz. 333 - - - - 59
Lambert *v.* Hepworth, 2 Q. B. 729; 11 L. J. Q. B. 85 - - 366
Lamont *v.* Southall, 5 M. & W. 416; 7 Dowl. Rep. 469 - - 322
Lancashire Cotton Spinning Co., In re, Ex parte Carnelley, 35 Ch. D. 656; 56 L. J. Ch. 761; 57 L. T. N. S. 511; 36 W. R. 305 - - - - - - - 104, 110, 113
Lane *v.* Dixon, 3 C. B. 776 - - - - - 123
Langford *v.* Selmes, 3 Jur. N. S. 859; 3 Kay. & J. 220 - - 53
Lanyon *v.* Carne, 2 Saund. 165 - - - - - 2
Laugher *v.* Humphrey, Cro. Eliz. 524 - - 6, 17, 55, 63
Launceston's Case, Cro. Eliz. 75 - - - - 127, 301
Laycock *v.* Tuffnell, 2 Chit. Rep. 531 - - - - 285
Layton *v.* Hurry, 8 Q. B. 811; 5 L. J. Q. B. 244 - 233, 234, 307
Leadenhall Market, In re, 2 Ld. Raym. 1589; Cro. Eliz. 628 - 127, 301
Lear *v.* Caldecott, 4 Q. B. 123 - - - - 172, 287, 288
Lear *v.* Edmonds, 1 B. & Ald. 157 - - - - 249, 290
Leary *v.* Pattrick, 15 Q. B. 274; 19 L. J. M. C. 211 - - 403
Lee *v.* Arnold, 4 Leon. 27 - - - - - - 171
Lee *v.* Cooke, 2 H. & N. 584; 3 H. & N. 203; 27 L. J. Ex. 337 - 102, 290, 376
Lee *v.* Lopes, 15 East, 230 - - - - 96, 268, 274
Lee *v.* Smith, 9 Exch. 662 - - - - 18, 168
Lee *v.* Vesey, 1 H. & N. 90 - - - - - - 382
Lees *v.* Wright, 1 D. & Ry. 391 - - - - - 290
Leftley *v.* Mills, 4 T. R. 173 - - - - - - 164
Legg *v.* Strudwick, 2 Salk. 414 - - - - - 172
Lehain *v.* Philpott, L. R. 10 Ex. 242; 44 L. J. Ex. 224; 33 L. T. N. S. 98 - - - - - - - - 264
Leicester Waterworks Co. *v.* Overseers of Cropstone, 44 L. J. M. C. 92; 32 L. T. N. S. 567, 752 - - - - - 391
Leigh *v.* Shepherd, 2 Brod. & B. 465; 5 Moore, 297 - 45, 46, 47, 215

PAGE

Leman *v.* Yorkshire Waggon Co., 29 W. R. 466 - - - 101
Levy *v.* Godson, 4 T. R. 687 - - - - - 269
Lewis *v.* Gingell, 4 C. B. 545; 16 L. J. C. P. 227 - - - 128
Lewis *v.* Harris, 1 H. Bl. 5 - - - 39, 54, 186, 194
Lewis *v.* Read, 13 M. & W. 834; 14 L. J. Ex. 295 - 82, 208, 324
Lincolnshire Finance Co. *v.* Farrant, 2 T. L. R. 248- - - 122
Lindon *v.* Hooper, 1 Cowp. 414 - - - - - 308
Lingen *v.* Payn, Bridg. 129; 2 Inst. 302 - - - - 49
Lingham *v.* Warren, 4 Moore, 409; 2 B. & B. 36 - 249, 290
Lister *v.* Brown, 1 C. & P. 121; 3 D. & Ryl. 501 - - - 204
Litchfield *v.* Ready, 20 L. J. Ex. 51 - - - - 88
Liverpool Adelphi Loan Association *v.* Fairhurst, 9 Exch. 422 - 82
Lloyd *v.* Davies, 2 Exch. 103; 18 L. J. Ex. 80 - - - 55
L. & N. W. Rail. *v.* Bedford, 17 Q. B. 978 - - - - 391
L. & N. W. Rail. *v.* Buckmaster, 44 L. J. M. C. 29, 180; 31 L. T. N. S. 835- - - - - - - 375
L. & N. W. Rail. *v.* Giles, 33 J. P. 776, 801 - - - 375
London and Yorkshire Bank *v.* Belton, L. R. 15 Q. B. D. 457 - 148
Long *v.* Buckeridge, 1 Stra. 112 - - - - - 366
Longbotham *v.* Berry, L. R. 5 Q. B. 123; 39 L. J. Q. B. 125 - 122
Loring *v.* Warburton, E. B. & E. 507; 28 L. J. Q. B. 31 - 171, 293
Lovering, Ex parte, In re Ayshford, 35 W. R. 652 - - 176
Lucas *v.* Tarleton, 3 H. & N. 116; 27 L. J. Ex. 246 -124, 228, 252, 329
Lundy Granite Co., In re, L. R. 6 Ch. App. 462; 24 L. T. N. S. 922 - - - - - - - - 109, 111
Lyell *v.* Kennedy, 18 Q. B. D. 807 - - - - - 179
Lynne *v.* Moody, 2 Stra. 851 - - - - 334, 335
Lyon *v.* Tomkies, 1 M. & W. 603; 1 Tyr. & Gr. 810- 259, 263, 264
Lyon *v.* Weldon, 2 Bing. 334 b; Moore, 629 - - - 247
Lyons *v.* Elliott, L. R. 1 Q. B. D. 210; 45 L. J. Q. B. 159; 33 L. T. N. S. 806 - - - - - - - - 136
Lyons *v.* Martin, 1 W. W. & H. 500; 8 A. & E. 513; 3 N. & P. 513 - - - - - - - -301, 307, 310

M.

Machell *v.* Ellis, 1 C. & K. 682 - - - - - 234
Maclean *v.* Dunn, 4 Bing. 722 - - - - - 214
Mallam *v.* Arden, 3 M. & Scott, 763; 10 Bing. 299; 3 L. J. C. P. 48 - - - - - - - 19, 166, 181, 182
Manby *v.* Long, 3 Lev. 107 - - - - - 85, 211
M. S. & L. Ry. Co. and the North Central Waggon Co., 32 Ch. Div. 477; 35 Ch. Div. 191; 13 App. Cas. 554 - - - 132

PAGE

Mann *v.* Lovejoy, Ry. & Moo. 355 - - - - - - 8
Manning *v.* Lunn, 2 C. & K. 13 - - - - - - 295
Manning *v.* Phelps, 10 Exch. 59 - - - - - - 178
Marlborough (Duke) *v.* Osborn, 5 B. & S. 67; 33 L. J. Q. B. 148 2
Marshall *v.* Pitman, 9 Bing. 595 - - - - - - 379
Martin *v.* Smith, L. R. 9 Ex. 50; 43 L. J. Ex. 53 - - 8, 10
Mary's Case, 9 Co. Rep. 112- - - - - - - 298
Mason *v.* Newland, 9 C. & P. 575 - - - 233, 308
Masters *v.* Farris, 1 C. B. 715 - - - - - - 323
Masters *v.* Green, 20 Q. B. D. 807; 59 L. T. N. S. 476; 36 W. R. 110; 52 J. P. 597 - - - - - - - 149
Mathews *v.* Carey, 1 Salk. 107; 1 W. Saund. 640; Carth. 74 - 361
Mathias *v.* Mesnard, 2 C. & P. 353 - - - 126, 134
Maund's Case, 7 Rep. 112; 7 Co. Rep. 28 - - 68, 164, 182
Maundy *v.* Maundy, 2 Stra. 1020- - - - - - 62
Mayor *v.* Croome, 1 Bing. 261 - - - - - - 96
May, Ex parte, 2 B. & S. 426; 31 L. J. M. C. 161 - - 390
Mayor of Poole *v.* Whitt, 15 M. & W. 571 - - - - 91
Mayor of Thetford's Case, 1 Salk. 192 - - - - 84
Mechelan *v.* Wallace, 7 Ad. & Ell. 54, n.; 6 N. & M. 316 - 30, 32, 170, 282
Meggison *v.* Lady Glamis, 7 Exch. 685 - - - - 33
Megson *v.* Mapleton, 49 L. T. N. S. 744 - - - - 341
Mellor *v.* Leather, 1 El. & Bl. 619; 22 L. J. M. C. 76; 12 Jur. 709 - - - - - - - - - 345
Mennie *v.* Blake, 6 El. & Bl. 842; 25 L. J. Q. B. 399; 2 Jur. N. S. 953 - - - - - - - - 345, 346
Messing *v.* Kemble, 2 Camp. 115- - - - - - 329
Miles *v.* Furber, L. R. 8 Q. B. 77; 42 L. J. Q. B. 41; 27 L. T. N. S. 756 - - - - - - - - - 135
Miller *v.* Green, 2 Cr. & J. 142; 1 L. J. Ex. 52; 2 Tyr. 1-67, 125, 139
Mills *v.* Trumper, L. R. 4 Ch. 320 - - - - - 26
Milward *v.* Caffyn, 2 W. Bl. 1330 - - - - - 384
Mitchell *v.* Holmes, 28 L. T. N. S. 72 - - - - 67
Mitchell *v.* Moorman, 1 You. & Jer. 21 - - - - 67
M'Leish *v.* Tate, Cowp. 781 - - - - 32, 169
Moffat *v.* Parsons, 5 Taunt. 307 - - - - - - 292
Moir *v.* Munday, 1 Burr. 590 - - - - - - 334
Moneux *v.* Goreham, 2 Selw. N. P. 9th ed. 1384 - - - 315
Moody *v.* Garnon, 1 Roll. Abr. 237 - - - - - 23
Moore *v.* Drinkwater, 1 F. & F. 134- - - - - 208, 324
Moore *v.* Earl of Plymouth, 3 B. & Ald. 66 - - - - 12
Moore *v.* Pyrke, 11 East, 52, 54 - - - - - - 248
Morgan, Ex parte, 4 Jur. 916 - - - - - - 206

PAGE

Morgan *v.* Earl of Abergavenny, 8 C. B. 768 - - - 141
Morgan *v.* Griffith, 7 Mod. 380 - - - - - 358
Morgan *v.* Parry, 17 C. B. 342 - - - - - 48
Morley *v.* Pincombe, 2 Exch. 101; 18 L. J. Ex. 272 - - 137
Morrell *v.* Martin, 3 M. & Gr. 590; 11 L. J. M. C. 22 - - 405
Morris *v.* Jeffries, L. R. 1 Q. B. 261- - - - - 241
Morris *v.* Mathews, 2 Q. B. 293 - - - - - 358
Morrish Dyke, Ex parte, In re Morrish, 47 L. T. N. S. 26; 30 W. R. 952; 27 S. J. 116 - - - - - 95, 102
Morrish, Ex parte, Re Morrish, L. R. 22 Ch. D. 410, 425; 48 L. T. N. S. 303 - - - - - - - 93
Mortimer *v.* Moore, 15 L. J. Q. B. 118, 309 - - - 344
Morton *v.* Palmer, 51 L. J. Q. B. D. 7 - - - - 158
Morton *v.* Woods, L. R. 4 Q. B. 293; 3 Q. B. 658; 37 L. J. Q. B. 242; 38 L. J. Q. B. 81; 18 L. T. N. S. 791; 9 B. & S. 632 -18, 32, 88, 98, 100, 168
Moss *v.* Gallimore, 1 Doug. 279 - - - - 90, 228
Mounsey *v.* Dawson, 6 Ad. & Ell. 752; 6 L. J. K. B. 251; 1 N. & P. 763 - - - - - - 344, 356
Mountjoy's Case, 5 Rep. 4 - - - - - - - 3, 41
Moyse *v.* Cocksedge, Willes, 636- - - - - 385
Mungean *v.* Wheatley, 6 Exch. 88 - - - - - 360
Murray *v.* King, 5 B. & A. 165 - - - - - 285
Musgrave *v.* Emmerson, 10 Q. B. 326; 16 L. J. Q. B. 175 - - 20
Muspratt *v.* Gregory, 1 M. & W. 633; 6 L. J. Ex. 34; 3 M. & W. 678; 7 L. J. Ex. 385 - - - - 126, 128
Myers *v.* Lockwood, 9 Dowl. 975; 11 L. J. Q. B. 47 - - 373

N.

Nargett *v.* Nias, 1 El. & El. 439; 28 L. J. Q. B. 143; 5 Jur. N. S. 128 - - - - - - - -140, 150, 321
Nash *v.* Lucas, L. R. 2 Q. B. 590; 8 B. & S. 531; 16 L. T. N. S. 610- - - - - - -219, 221, 324, 333
National Arms and Ammunition Co., Limited, In re, Ex parte Corporation of Birmingham, 28 Ch. D. 474; 54 L. J. Ch. 673; 52 L. T. N. S. 237 - - - - - - 110
Neale *v.* Mackenzie, 1 M. & W. 747; 4 L. J. Ex. 185; 6 L. J. Ex. 263; 2 C. M. & R. 84; 5 Tyr. 1106 - - 5, 33, 34, 333
Neave *v.* Moss, 1 Bing. 360; 8 Moore, 389 - - - 54
Ness *v.* Stevenson, L. R. 9 Q. B. D. 245 - - - - 160
New City Constitutional Club, In re, Ex parte Purssell, 34 Ch. D. 646; 55 L. J. Ch. 704; 56 L. J. Ch. 332; 54 L. T. N. S. 864; 56 L. T. N. S. 792; 35 W. R. 421; 2 T. L. R. 758; 3 T. L. R. 331 - - - - - - - - - 112

PAGE

Newby *v.* Singleton, 1 L. J. K. B. 165 - - - - 361
Newcomb *v.* Harvey, Carth. 161 - - - - - 41
Newling *v.* Pearce, 1 B. & C. 437; 2 D. & R. 607 - - - 75
Newman *v.* Anderton, 2 New Rep. 224; 5 Bos. & P. 224 - 3, 4
Newnham *v.* Bever, 8 C. B. 560; 19 L. J. C. P. 129 - - 72
Newton *v.* Scott, 9 M. & W. 434; 10 M. & W. 471; 11 L. J. Ex. 121 - - - - - - - 103, 143
Niblett *v.* Smith, 4 T. R. 504 - - - - 120, 346, 348
Nichols ats ——, Lofft, 393 - - - - - - 168
Nichols *v.* Walker, Cro. Car. 394 - - - - - 384
Nixon *v.* Freeman, 5 H. & N. 647; 29 L. J. Ex. 271; 2 L. T. N. S. 361 - - - - - - 184, 185, 220, 322
Norris *v.* Carrington, 16 C. B. N. S. 10 - - - - 364
Norris *v.* Harrison, 2 Madd. 268 - - - - - 26
North *v.* Wyard, 2 Bulstr. 233; 1 Roll. Rep. 52 - - - 77
North Central Waggon Co. *v.* M. S. & L. Ry. Co., 32 Ch. Div. 477; 35 Ch. Div. 191; 13 App. Cas. 554 - - - - 132
North Yorkshire Iron Co., Re, L. R. 7 Ch. D. 661; 38 L. T. N. S. 143 - - - - - - - 106, 108, 109
Northfield *v.* Nightingale, 1 L. J. K. B. 219 - - - 198
Nott *v.* Bound, L. R. 1 Q. B. 405; 14 L. T. N. S. 330 - - 262
Notts *v.* Curtis, 5 C. & P. 323; 1 L. J. Ex. 130 - 125, 246, 330
Novello *v.* Toogood, 1 B. & C. 554 - - - - 118
Nuttall *v.* Staunton, 4 B. & C. 51 - - - 39, 53, 186, 194

O.

Oak Pitts Colliery Co., Re, L. R. 21 Ch. D. 322; 51 L. J. Ch. 768 - - - - - - - - 106
Oates *v.* Frith, Hob. Rep. 130 - - - - 12, 56
O'Connor *v.* O'Connor, 4 Ir. Rep. Eq. 483 - - - 22, 23
O'Donoghue *v.* Coalbrook Co., 26 L. T. N. S. 806 - - - 175
Ognell's Case, 4 Co. Rep. 50 b - - - - - 59, 77
Opperman *v.* Smith, 4 D. & R. 33 - - - - - - 199
Orby *v.* Mohun, 2 Vern. 531, 542; 2 Freeman, 291; 3 Bro. Parl. Cas. 248; Gilb. Eq. Rep. 45 - - - - - - 4
Ormerod *v.* Chadwick, 16 M. & W. 367; 16 L. J. M. C. 143; 11 J. P. 138 - - - - - - - - - 380
Osborne *v.* Wickenden, 2 Saund. 195 - - - - 77
Overseers of East Dean *v.* Everett, 30 L. J. M. C. 117 - - 375
Overseers of Birmingham Poor, In re Birmingham New Library, 10 Q. B. 868; 18 L. J. M. C. 89 - - - - - 395

PAGE

Overseers of Manchester Poor *v.* Headlam and L. & N. W. Ry. Co., 21 Q. B. D. 96; 57 L. J. M. C. 89; 52 J. P. 388; 4 T. L. R. 579 - - - - - - - 380
Owen *v.* De Beauvois, 5 Exch. 166; 16 M. & W. 547 - - 179
Owen *v.* Legh, 3 B. & Ald. 470 - - -124, 138, 253, 331
Owens *v.* Wynne, 4 El. & Bl. 579 - - - - 68, 172, 287
Oxenham *v.* Collins, 2 F. & F. 172 - - - - - 283
Oxenham *v.* Smyth, 6 H. & N. 690; 2 F. & F. 220 - - 82
Oxley *v.* James, 13 M. & W. 209 - - - - - 43

P.

Page *v.* Eamer, 1 Bos. & Pul. 378 - - - - 355
Paget *v.* Foley, 2 Bing. N. C. 679 - - - - 178, 179
Painter *v.* Liverpool New Gas & Coke Co., 3 Ad. & Ell. 433; 5 L. J. M. C. 108 - - - - - - 376
Palfrey *v.* Baker, 3 Price, 572 - - - - - 285
Palgrave *v.* Windham, 1 Stra. 212 - - 270, 273, 274, 275
Palmer *v.* Earith, 14 M. & W. 431 - - - - - 176
Palmer *v.* Strange, 1 Lev. 43; 1 Sid. 44 - - - - 172
Panton *v.* Jones, 3 Camp. 372 - - - - - 36
Parke, Ex parte, Re Potter, L. R. 18 Eq. 381; 30 L. T. N. S. 618 89
Parker *v.* Harris, 4 Mod. 78; 1 Salk. 262 - - - - 6
Parker *v.* Taswell, 6 C. & P. 166; 2 De G. & J. 559; 27 L. J. Ch. 812 - - - - - - - 10, 252
Parkinson *v.* Potter, 16 Q. B. D. 161 - - - - 118
Parmenter *v.* Webber, 8 Taunt. 593; 2 Moore, 656 - 33, 42
Parrett Navigation Co. *v.* Stower, 6 M. & W. 564; 8 Dowl. Rep. 405 - - - - - - - - - 317
Parrott *v.* Anderson, 7 Exch. 93; 21 L. J. Ex. 290 - 82, 286
Parry *v.* Duncan, 7 Bing. 243; Moo. & Malk. 533; 5 M. & P. 19 - 199
Parry *v.* Hindle, 2 Taunt. 181 - - - - - 77
Parsons *v.* Gingell, 16 L. J. C. P. 227; 4 C. B. 545 - 128, 136
Partington *v.* Woodcock, 6 A. & E. 690; 5 N. & M. 672 - - 91
Partridge *v.* Naylor, Cro. Eliz. 480; Moore, 453 - - - 237
Pascoe *v.* Pascoe, 3 Bing. N. C. 898 - - - - - 42
Patchett *v.* Bancroft, 7 T. R. 367 - - - - - 382
Paton *v.* Carter, 1 C. & E. 183 - - - - - 115
Patrick *v.* Balls, Carth. 390 - - - - - 85
Paul *v.* Goodlake, 2 Bing. N. C. 220 - - - - - 355
Paull *v.* Best, 32 L. J. Q. B. 96; 3 B. & S. 537 - - - 103
Payne *v.* Esdaile, W. N. (1886), p. 35; 59 L. J. N. S. 568; 33 Sol. J. 107; 13 App. Cas. 613 - - - - - 179

PAGE
Paynter *v.* The Queen, 16 L. J. M. C. 136; 10 Q. B. 908 - 380
Peacock *v.* Purvis, 2 Brod. & B. 362- - - - - 143
Peake, In re, Ex parte Harrison, 13 Q. B. D. 753; 53 L. J. Ch. 977 - - - - - - - - - 95, 100
Pearce *v.* Cheslyn, 5 N. & M. 652; 5 L. J. K. B. 113 - - 31
Pease *v.* Chaytor, 3 B. & S. 634; 32 L. J. M. C. 121 - 359, 362
Pedley *v.* Davies, 26 J. P. 343, 370; 31 J. P. 655 - - - 384
Pennant's Case, 3 Co. Rep. 64; 1 Inst. 47 b - - - 185
Peppercorn *v.* Hoffman, 9 M. & W. 618; 12 L. J. Ex. 270 - - 151, 241, 376, 408
Percival *v.* Stamp, 22 L. J. Ex. 25 - - - - 224
Perreau *v.* Bevan, 5 B. & C. 301; 8 D. & R. 72 - - 358, 372
Perring *v.* Brook, 7 C. & P. 360; 1 Moo. & R. 510 - - 9
Perryman *v.* Bowden, Het. 59 - - - - - 182
Phillips *v.* Berryman, 3 Doug. 286 - - - - 336
Phillips *v.* Henson, L. R. 3 C. P. D. 26; 47 L. J. C. P. 273; 37 L. T. N. S. 432; 26 W. R. 214 - - - - - 158
Phillips *v.* Naylor, 22 J. P. 355 - - - - - 387
Phillips *v.* Shervill, 6 Q. B. 944; 14 L. J. Q. B. 144 - 103, 143
Phillips *v.* Whitsed, 2 E. & E. 804; 29 L. J. Q. B. 146; 2 L. T. N. S. 278; 6 Jur. N. S. 729 - - - - - 229
Philpot *v.* Lehain, 35 L. T. N. S. 855 - - - 249, 252, 264
Pigott *v.* Bertles, 1 M. & W. 441; 5 L. J. Ex. 193; Tyr. & Gr. 729; 2 Gale, 18 - - - 124, 138, 147, 249, 288, 338, 339
Pilkington *v.* Dalton, Cro. Eliz. 575 - - - 56, 167
Pilkington *v.* Hastings, Cro. Eliz. 813 - - - - 293
Pilton, Ex parte, 1 B. & A. 369 - - - - - 205
Pim *v.* Greville, 6 Esp. 95 - - - - - - 182
Pinero *v.* Judson, 6 Bing. 206 - - - - - 30
Pinhorn *v.* Souster, 8 Exch. 763; 22 L. J. Ex. 18, 266 - 88, 92
Pitt *v.* Shew, 4 B. & Ald. 208 - - - - - 252
Pitt *v.* Snowdon, 3 Atk. 750 - - - - - - 80
Place *v.* Fagg, 4 M. & R. 277 - - - - - 120
Pluck *v.* Digges, 2 Dow & Clarke, 180 - - - - 198
Plumer *v.* Brisco, 11 Q. B. 46 - - - - - 355
Plummer, Ex parte, 1 Atk. 103 - - - - 82, 94
Pollen's Trustees, In re, Ex parte Davis, 54 L. T. N. S. 304; 55 L. J. Q. B. 217; 2 T. L. R. 229 - 142, 143, 268, 271, 272
Pollitt *v.* Forrest, 11 Q. B. 949 - - - - - 5, 35
Pollock *v.* Stacey, 5 Q. B. 1033 - - - - - 42
Pool *v.* Lewin, Crawcour & Co., 1 T. L. R. 165 - - - 226
Pool *v.* Neel, 2 Sid. 29 - - - - - - 55
Poole's Case, 3 B. & C. 368; 1 Salk. 368; 3 Atk. 13- - - - 120
Poole *v.* Longueville, 2 Saund. 289 - - - - 303

PAGE

Pope *v.* Biggs, 9 B. & C. 245 - - - - - 90, 91
Pope *v.* Davis, 2 Taunt. 252; 2 Camph. 266 - - - 237
Postman *v.* Harrell, 6 C. & P. 225 - - - - 200, 333
Potten *v.* Bradley, 2 Moo. & Payne, 78 - - - - 361
Potter *v.* North, 1 Saund. 347, n. (4); 1 W. Saund. 635 - 214, 361
Poultner *v.* Holmes, Stran. 405 - - - - - 42
Powis *v.* Smith, 5 B. & Ald. 850; 1 D. & Ryl. 490 - - - 50
Poynter *v.* Buckley, 5 C. & P. 512 - - - 255, 331
Preece *v.* Corrie, 5 Bing. 24 - - - - - - 42
Prescott *v.* Boucher, 3 B. & Ad. 849 - - - 58, 78
Price *v.* Worwood, 4 H. & N. 512; 28 L. J. Ex. 329- - - 191
Priestley *v.* Watson, 2 Cromp. & M. 691; 3 L. J. M. C. 113; 4 Tyr. 916 - - - - - - - 391
Progress Assurance Co., In re, L. R. 9 Eq. 370; 22 L. T. N. S. 707- - - - - - - - - 109
Proudlove *v.* Twemlow, 1 C. & M. 326; 2 L. J. Ex. 111 - 124, 138, 253, 331
Pugh *v.* Griffith, 7 A. & E. 827 - - - - - 222
Pulbrook *v.* Ashby & Co., 56 L. J. Q. B. 376; 35 W. R. 779 - 101
Pullen *v.* Palmer, 3 Salk. 207; 5 Mod. 72; Carth. 328 - 48, 50, 77
Punnett, Ex parte, Re Kitchen, L. R. 16 Ch. D. 226; 50 L. J. Ch. 212; 29 W. R. 129; 44 L. T. N. S. 226 - - - 98
Purssell, Ex parte, In re New City Constitutional Club, 34 Ch. D. 646; 55 L. J. Ch. 704; 56 L. J. Ch. 332; 54 L. T. N. S. 864; 56 L. T. N. S. 792; 35 W. R. 421; 2 T. L. R. 758; 3 T. L. R. 331- - - - - - - - - 112
Pusey *v.* Pusey, 1 White & Tudor's Leading Cas. 890 - - 321
Pyle *v.* Partridge, 15 M. & W. 20 - - - - - 215

Q.

Queen's Benefit Building Society, Ex parte, Re Threlfall, L. R. 16 Ch. D. 274; 50 L. J. Ch. 318; 44 L. T. N. S. 74; 29 W. R. 128 - - - - - - - - - 99

R.

Rand *v.* Vaughan, 1 Bing. N. C. 767; 4 L. J. C. P. 239- 198, 199
Randall *v.* Jenkins, 1 Mod. Rep. 110; 2 Lev. 87 - - 13, 56
Rapley *v.* Taylor, 1 C. & E. 150 - - - -255, 331, 339
Ratt *v.* Parkinson, 20 L. J. M. C. 208 - - - - 408
Rawlings *v.* Bell, 1 C. B. 951; 14 L. J. C. P. 265; 9 Jurist, 973- 82
Rawlings, Ex parte, In re Davis & Co., W. N. 1888, p. 236 40, 68, 92
Rawson *v.* Eicke, 7 A. & E. 451; 2 N. & P. 443 - - - 90

PAGE
Read's Case, Cro. Eliz. 594 - - - - - - 140
Reddell *v.* Stowey, 2 M. & Rob. 358 - - - - 313
Rede *v.* Burley, Cro. Eliz. 596 - - - 127, 129, 130
Reece *v.* Strousberg, 54 L. T. N. S. 133; 50 J. P. 292 - 90, 210, 362
Reed *v.* Thoyts, 6 M. & W. 410; 8 Dowl. 410 - 268, 269, 275
Rees *d.* Powell *v.* King, 2 Brod. & B. 514; Forrest, 19 - - 191
R. *v.* Barclay, JJ. of Essex, 46 J. P. 167- - - 379, 380
R. *v.* Binney, 1 E. & B. 810 - - - - - - 410
R. *v.* Boyle, 7 Cox, C. C. 328 - - - - - 381
R. *v.* Clarke, 4 L. J. M. C. 92 - - - - 398, 405
R. *v.* Collins, 21 L. J. M. C. 73 - - - - - 379
R. *v.* Dyer & Hall, JJ. of Middlesex, 2 Ad. & Ell. 606 - - 381
R. *v.* East Pomfret, 5 M. & S. 139 - - - - 3
R. *v.* Ellis & Greenwood, 2 Dowl. Rep. N. S. 361; 12 L. J. M. C. 20 - - - - - - - - - 385
R. *v.* Handsley, JJ. of Burnley, L. R. 7 Q. B. D. 398 - - 384
R. *v.* Hughes, JJ. of Stafford, 3 Ad. & Ell. 425 - - - 383
R. *v.* Inhabitants of St. Austell, 5 B. & A. 693 - - - 3
R. *v.* JJ. of Bucks, 3 L. J. M. C. 58 - - - - - 379
R. *v.* JJ. of Essex, 41 J. P. 676 - - - - - 379
R. *v.* JJ. of Kingston, 23 J. P. 5; 1 El. B. & E. 256; 27 L. J. M. C. 199 - - - - - - - 379, 383
R. *v.* JJ. of Leicester, 8 E. & B. 557 - - - - 394
R. *v.* JJ. of Middlesex, 12 L. J. M. C. 36 - - - - 383
R. *v.* JJ. of Newcastle, Ex parte Brown, 26 W. R. 727; 42 J. P. 598; 38 L. T. N. S. 682 - - - - - 399
R. *v.* JJ. of New Sarum, 17 J. P. 53; 20 L. T. N. S. 207 - 386, 387
R. *v.* JJ. of Norfolk, 7 El. & Bl. 950 - - - - 383
R. *v.* JJ. of Oxford, 18 L. J. M. C. 222 - - - - 394
R. *v.* JJ. of Salop, 13 Q. B. 654 - - - - - 395
R. *v.* JJ. of St. Albans, 3 B. & C. 698 - - - - 394
R. *v.* JJ. of St. Peter's Library, York, 2 L. J. M. C. 46 - - 391
R. *v.* JJ. of Worcester, 12 Ad. & Ell. 779 - - - 383
R. *v.* Newcombe, 4 T. R. 368 - - - - - 383
R. *v.* North Duffield, 3 M. & S. 247 - - - - 85
R. *v.* Oliver, Bunb. 14 - - - - - - 346
R. *v.* Paget, L. R. 8 Q. B. D. 151; 30 W. R. 337; 46 J. P. 151 - 399
R. *v.* Paynter, 7 Q. B. 255; 10 Q. B. 988; 11 L. J. M. C. 136 - 380
R. *v.* Pearson, 19 J. P. 294 - - - - - 380
R. *v.* Pratt, L. R. 5 Q. B. 176; 39 L. J. M. C. 73 - - - 410
R. *v.* Trecothick, 2 Ad. & Ell. 405 - - - - 383
R. *v.* Yarmouth, 16 L. J. M. C. 175 - - - - 384
Reg. *v.* Boteler, 33 L. J. M. C. 101 - - - - 379

PAGE

Reg. *v.* Bradshaw, JJ. of Warwick, 2 El. & El. 836 - - 379
Reg. *v.* Burgess, 2 T. L. R. 176 - - - - - 210
Reg. *v.* Cory, 10 Cox, C. C. 23 - - - - - 141
Reg. *v.* Eastern Counties Ry. Co., 5 El. & Bl. 974 - - 376
Reg. *v.* Gee, JJ. of Chesterfield, 1 T. L. R. 388 - - - 319
Reg. *v.* Gurdon, 12 W. R. 201 - - - - 356, 359
Reg. *v.* Headlam, 21 Q. B. D. 96; 57 L. J. M. C. 89; 52 J. P. 388; 4 T. L. R. 579 - - - - - - 380
Reg. *v.* JJ. of Gloucester, 24 J. P. 39 - - - - 377
Reg. *v.* JJ. of Kent, 16 L. T. N. S. 673 - - - - 376
Reg. *v.* JJ. of Radnor, 9 Dowl. 90 - - - - 206
Reg. *v.* JJ. of Shropshire, L. R. 6 Q. B. D. 669; 50 L. J. M. C. 72 - 207
Reg. *v.* Marsham, 50 L. T. N. S. 142 - - - - 384
Reg. *v.* Morrish, 32 L. J. M. C. 245 - - - - 9
Reg. *v.* Price, L. R. 5 Q. B. D. 300; 42 L. T. N. S. 439; 44 J. P. 315; 49 L. J. M. C. 49 - - - - 375, 393
Reg. *v.* Raines, 1 El. & Bl. 855; 22 L. J. Q. B. 223 - 356, 359
Reg. *v.* Robinson, 28 L. J. M. C. 58 - - - - 141
Reg. *v.* Shickle, L. R. 1 C. C. R. 158; 38 L. J. M. C. 21 - - 141
Reg. *v.* Westbrook, 10 Q. B. 178 - - - - 5
Reg. *v.* Williams, 19 L. J. M. C. 126; 2 C. & K. 1001; 4 New Sess. Cas. 137 - - - - - 315, 381
Regent United Service Stores, In re, L. R. 8 Ch. D. 616; 38 L. T. N. S. 130 - - - - 94, 105, 108, 398
Regnart *v.* Porter, 7 Bing. 451; 5 M. & P. 370 8, 30, 170, 282
Rex *v.* Benn and Church, 6 T. R. 198 - - - - 376
Rex *v.* Bradshaw, 7 C. & P. 233 - - - - 312, 335
Rex *v.* Chipping Norton, 5 East, 239, 242 - - - - 85
Rex *v.* Clarke, Cowp. 612 - - - - - 237
Rex *v.* Cotton, 2 Ves. sen. 288; Parker, 121 - - - 315
Rex *v.* Davis, 5 B. & Ad. 551; 2 N. & M. 349; 2 L. J. M. C. 29 206
Rex *v.* Flanagan, 10 Cox, C. C. 561 - - - 190, 209
Rex *v.* Ford, 2 Ad. & Ell. 588; 4 L. J. M. C. 58 - - - 377
Rex *v.* Hasler, JJ. of Essex, 3 L. J. M. C. 56 - - - 379
Rex *v.* Hodgson, 1 Leach C. C. 6; 1 East P. C. 258 - - 202
Rex *v.* Horsley, 8 East, 410 - - - - - 61
Rex *v.* JJ. of Cheshire, 5 B. & Ad. 439 - - - - 205
Rex *v.* Morgan, Cald. 157 - - - - - 205
Rex *v.* Rabbits, 6 D. & Ry. 243 - - - - - 205
Reynell *v.* Campernoon, Cro. Car. 228 - - - 140, 302
Reynolds *v.* Barford, 7 M. & G. 449; 2 D. & L. 327 - - - 272
Rich *v.* Woolley, 7 Bing. 651; 5 M. & P. 663 - - 201, 316
Richmond *v.* Butcher, Cro. Eliz. 217; Dyer, 45 - - - 56

PAGE

Ridgway *v.* Lord Stafford, 6 Exch. 405; 19 L. J. Ex. 226 145, 255
Riseley *v.* Ryle, 11 M. & W. 16; 1 Dowl. Rep. N. S. 660; 12 L. J. Ex. 322 - - - - - - - 30, 142, 269, 270
River Swale Brick & Tile Company, Limited, 48 L. T. N. S. 778 113
Rivis *v.* Watson, 5 M. & W. 255; 9 L. J. Ex. 67 - - 46, 51, 68
Roberts *v.* Jackson, 2 Peake, 36 - - - - - - 150
Roberts *v.* Snell, 1 Man. & G. 577 - - - - 345, 348
Robinson *v.* Hoffman, 4 Bing. 562; 1 M. & P. 474; 3 C. & P. 234 - - - - - - - - 45, 48, 215
Robinson *v.* Learoyd, 7 M. & W. 48 - - - - - - 3
Robinson *v.* Waddington, 13 Q. B. 753; 18 L. J. Q. B. 250 228, 251
Robinson *v.* Walter, 3 Bulstr. 269 - - - - 137
Rocke *v.* Hills, 3 T. L. R. 298 - - - 247, 327, 330
Rockingham (Lord) *v.* Penrice, 1 Salk. 578; 1 P. Wms. 177 - 26, 165
Roden *v.* Eyton, 6 C. B. 427; 18 L. J. C. P. 1 - - 247, 335
Roe *v.* Ashburner, 5 T. R. 163 - - - - - - 10
Roffey *v.* Henderson, 17 Q. B. 574 - - - - 330
Rogers *v.* Birkmire, 2 Stra. 1040; Rep. Temp. Hard. 245 - 171, 193
Rogers *v.* Humphreys, 4 Ad. & Ell. 299; 5 N. & M. 511; 1 H. & W. 625; 5 L. J. K. B. 65 - - - - 44, 91, 93
Rogers *v.* Parker, 18 C. B. 112; 25 L. J. C. P. 220 - 124, 252, 253, 329
Rollaston *v.* Leon, 7 H. & N. 73; 31 L. J. Ex. 96 - - 30
Ross *v.* Clifton, 11 Ad. & Ell. 631 - - - - - 333
Rothery *v.* Wood, 3 Camp. 24 - - - - 270, 276
Rushton's Case, Dy. 4 b - - - - - - 23
Russell *v.* Ryder, 6 C. & P. 416 - - - - - 222
Russell *v.* Shoolbred, 29 Ch. D. 254 - - - - 43, 286
Ryan *v.* Shilcock, 7 Exch. 72; 21 L. J. Ex. 55 - - 219, 220
Ryan *v.* Thompson, 37 L. J. C. P. 134 - - - - 177
Ryder *v.* Edwards, 3 Man. & Gr. 202 - - - - 358

S.

Sabourin *v.* Neale, 2 H. & W. 103 - - - - 381
Sacheverell *v.* Frogate, 1 Vent. 162; 2 Saund. 367 - 12, 13, 55, 56, 57, 61
Sacker *v.* Chidley, 13 W. R. 690 - - - - - 100
Saffery *v.* Elgood, 1 A. & E. 191; 3 L. J. K. B. 151; 3 N. & M. 346 - - - - - - - 114, 116
Salmon *v.* Matthews, 8 M. & W. 827 - - - - 22
Salwey *v.* Salwey, Amb. 693; 2 Dick. 434 - - - - 78
Sandars, In re, Ex parte Sarjeant, 52 L. T. N. S. 516; 54 L. J. Q. B. 331; 49 J. P. 582 - - - - - 212

PAGE
Sands *v.* Hempston, 2 Leon. 142 - - - - - 63
Sapsford *v.* Fletcher, 4 T. R. 511 - - - - - 175
Sarjeant, Ex parte, Re Sandars, 52 L. T. N. S. 516; 54 L. J. Q. B. 331; 49 J. P. 582 - - - - - - 212
Saunders *v.* Musgrove, 6 B. & C. 524- - - - 270, 271
Saunderson *v.* Hanson, 3 C. & P. 314 - - - - 176
Scott *v.* Buckley, 16 L. T. N. S. 573- - - - - 221
Selby *v.* Greaves, L. R. 3 C. P. 594; 37 L. J. C. P. 251; 19 L. T. N. S. 186 - - - - - -5, 33, 35, 194
Sells *v.* Hoare, 8 M. & W. 451; 1 C. & P. 28; 1 Bing. 401 - 324, 339
Semayne's Case, 5 Co. Rep. 91 - - - - - 218
Seven *v.* Mihill, 1 Ld. Ken. 370 - - - 143, 278, 285
Shaftesbury (Earl) *v.* Russell, 3 D. & R. 84; 1 B. & C. 666- - 396
Shannon *v.* Shannon, 1 Sch. & Lef. 324 - - - - 345
Sharpe *v.* Fowle & Young, 12 Q. B. D. 385; 50 L. T. N. S. 758; 53 L. J. Q. B. 309; 32 W. R. 539; 48 J. P. 680 - - - 162
Shaw *v.* Earl of Jersey, L. R. 4 C. P. D. 120, 359; 44 L. J. C. P. 308 - - - - - - - - 295
Sheape *v.* Culpepper, 1 Lev. 255 - - - - - 362
Sheffield and South Yorkshire Permanent Building Society *v.* Harrison, 15 Q. B. D. 358; 54 L. J. Q. B. 15; 51 L. T. N. S. 649 - - - - - - - - 122
Shepherd *v.* Hills, 11 Exch. 55 - - - - - 377
Sheriff *v.* James, 1 Bing. 341; 8 Moore, 334 - - - 308
Shipwick *v.* Blanchard, 6 T. R. 298 - - - - - 332
Shopland *v.* Rydler, Cro. Jac. 55, 98 - - - - 76
Shuttleworth, Ex parte, Re Dean, 1 D. & C. 223 - - 94, 100
Silkstone Coal Co., In re, L. R. 17 Ch. D. 158; 44 L. T. N. S. 405 - - - - - - - - 109, 111
Silvester *v.* Bedford. (See Bedford *v.* Wardens of Sutton Coldfield.)
Simpkin *v.* Robinson, 45 L. T. N. S. 221 - - - - 382
Simpson *v.* Hartopp, 1 Sm. L. C. 8th ed. 456 - 119, 120, 125, 128, 129, 130, 131, 139, 140
Simpson *v.* Routh, 2 B. & C. 682 - - - - - 264
Simms *v.* Tuffs, 6 C. & P. 207 - - - - 226, 255
Singleton *v.* Williamson, 7 H. & N. 410; 31 L. J. Ex. 17; 5 L. T. N. S. 664; 8 Jur. N. S. 60 - - - - 304, 308
Six Carpenters' Case, Co. Litt. 146; 1 Sm. L. C. 8th ed. 143 - 230, 292, 393, 308, 314, 322, 326
Skeate *v.* Beale, 11 Ad. & E. 983; 9 L. J. Q. B. 233; 3 P. & D. 597 - - - - - - - - 308, 337
Skerry *v.* Preston, 2 Chit. Rep. 245 - - - - 284
Skidmore *v.* Booth, 6 C. & P. 777 - - - - - 223
Skingley *v.* Surridge, 11 M. & W. 503; 12 L. J. M. C. 122 - 375

PAGE

Smallman *v.* Pollard, 6 M. & G. 1001; 13 L. J. C. P. 116; 1 D. & L. 901 - - - - - - - - 270
Smartle *v.* Williams, 1 Salk. 246; 3 Lev. 387 - - - 88
Smith *v.* Adkins, 8 M. & W. 362 - - - - - 86
Smith *v.* Ashforth, 29 L. J. Ex. 259 - - 240, 330, 336, 340
Smith *v.* Barrett, 1 Sid. 162 - - - - - - 85
Smith *v.* Birmingham and Staffordshire Gas Co., 1 Ad. & Ell. 526 - - - - - - - 86, 214, 350
Smith *v.* Day, 2 M. & W. 684; M. & H. 135; 6 L. J. Ex. 219 - 41, 282
Smith *v.* Farr, 3 F. & F. 505 - - - - - 223
Smith *v.* Goodwin, 4 B. & Ad. 413; 1 N. & M. 371; 2 L. J. K. B. 192 - - - - - - 172, 288, 291, 292
Smith *v.* Malings, Cro. Jac. 160 - - - - - 22
Smith *v.* Mapleback, 1 T. R. 441 - - - - - 42
Smith *v.* Pearce, M. S. Sittings at Guildhall after M. T. 43 Geo. III.—Lord Ellenborough, C.J. - - - - 175
Smith *v.* Russell, 3 Taunt. 400 - - - - 142, 268, 274
Smith *v.* Torr, 3 F. & F. 505 - - - - 40, 290
Smith *v.* Wright, 6 H. & N. 821; 30 L. J. Ex. 313 - 235, 314
Smyth, Ex parte, 1 Swanst. 338, note (*n*) - - - 21, 52
Snelgar *v.* Henston, Cro. Jac. 611 - - - - 51
Snell *v.* Finch, 13 C. B. N. S. 651; 32 L. J. C. P. 117; 7 L. T. N. S. 747 - - - - - - 82, 90, 210, 362
Sollory *v.* Leaver, 21 L. T. N. S. 453 - - - - 67
South Kensington Co-operative Stores, Limited, In re, L. R. 17 Ch. D. 161; 44 L. T. N. S. 471 - - -106, 108, 109, 111
Southampton (Lord) *v.* Brown, 6 B. & C. 718 - - - 12
Southwark Bridge Co. *v.* Sills, 2 C. & P. 371 - - - 85
Spencer *v.* Harrison, 2 C. & K. 429 - - - - 200
Spencer's Case, 5 Co. Rep. 17 - - - - - 3
Spice *v.* Webb, 2 Jur. 943 - - - - - 226
Spragg *v.* Hammond, 2 B. & B. 59 - - - - - 176
St. John's College, Oxford *v.* Murcott, 7 T. R. 259 - - 267
Stafford's Case, Dyer, 252 - - - - - - 56
Stafford (Earl of) *v.* Buckley, 2 Ves. Rep. 170 - - - 41
Stanfield *v.* Hicks, Lord Raym. 280 - - - - - 172
Stanley *v.* Wharton, 9 Price, 301; 10 Price, 138 - - 200, 204, 205
Stansfield *v.* Hellawell, 7 Exch. 373; 21 L. J. Ex. 148 - - 368
Staveley *v.* Alcock, 16 Q. B. 636; 20 L. J. Q. B. 320; 15 Jur. 628 - - - - - - - 41, 46, 48
Staveley *v.* Grundy, L. R. 22 Ch. D. 478 - - - - 99
Steadman *v.* Bates, 1 Lord Raym. 64 - - - - 45
Steadman *v.* Page, 5 Mod. 141; 1 Salk. 390 - - - 45

PAGE
Stevens *v.* Evans, 2 Burr. 1152 - - - - - 377
Stevenson *v.* Lombard, 2 East, 580 - - - - 22, 23
Stevenson *v.* Newnham, 13 C. B. 285; 22 L. J. C. P. 110 - 228, 340
Stevenson *v.* Wood, 5 Esp. 200 - - - - - 96
Stockton Iron Furnace Co., In re, L. R. 10 Ch. D. 335; 48 L. J. Ch. 417; 27 W. R. 433; 40 L. T. N. S. 19 - 93, 97, 100
Storey *v.* Robinson, 6 T. R. 138 - - - - 139, 140, 301
Story *v.* Finnis, 6 Exch. 123; 2 L. M. & P. 198 - - - 313
Stoughton *v.* Leigh, 1 Taunt. 410 - - - - 54
Strachan *v.* Thomas, 12 A. & E. 536; 4 P. & D. 229; 4 Jur. 1183 - - - - - - - 178, 180
Strafford (Earl of) *v.* Lady Wentworth, 1 P. Wms. 180; Prec. Ch. 555 - - - - - - - 26
Stubbs *v.* Parsons, 3 B. & Ald. 516 - - - 176, 285
Stukeley *v.* Butler, Hob. 172- - - - - - 46
Sturch *v.* Clarke, 2 B. & Ad. 113; 2 L. J. K. B. 9 - - 405
Sullivan *v.* Bishop, 2 C. & P. 359 - - - - - 39
Sutton *v.* Rees, 32 L. J. Ch. 437; 9 Jur. N. S. 456 - - 143
Swain *v.* Ayres, 20 Q. B. D. 585; 21 Q. B. D. 289; 36 W. R. 798 9
Swann *v.* Earl of Falmouth, 4 Q. B. 123; 8 B. & C. 456; 2 M. & R. 534 - - - - - - 225, 239
Sweeting *v.* Turner, L. R. 7 Q. B. 310; 41 L. J. Q. B. 52; 25 L. T. 796; 20 W. R. 185 - - - - - - 136
Sweetman *v.* Guest, L. R. 3 Q. B. 262; 37 L. J. M. C. 59; 18 L. T. N. S. 52 - - - - - - - 375
Swire *v.* Leach, 18 C. B. N. S. 479; 34 L. J. C. P. 150; 11 L. T. N. S. 680 - - - - - - - 136, 321
Swynerton *v.* Mills, Br. & G. 178 - - - - 182

T.

Talentine *v.* Denton, Cro. Jac. 111 - - - - - 42
Tancred *v.* Leyland, 16 Q. B. 669 - - - 171, 228, 340
Tanfield *v.* Rogers, Cro. Eliz. 340 - - - - - 171
Tapling *v.* Weston, 1 C. & E. 99 - - - - - 126
Tate *v.* Gleed, 1 M. & W. 647; 2 Wms. Saund. 290, n. (f) - - 127
Taunton, Ex parte, 1 Dowl. Rep. 54 - - - - 393
Taunton *v.* Costar, 7 T. R. 431 - - - - - 300
Taylerson *v.* Peters, 7 A. & E. 110; 2 N. & P. 622; W. W. & E. 644; 1 Jur. 497 - - - - - - 186
Taylor *v.* Caldwell, 3 B. & S. 826; 32 L. J. Q. B. 164 - - 9

PAGE
Taylor *v.* Eastwood, 1 East, 212 - - - - - 310
Taylor *v.* Eckersley, L. R. 5 Ch. D. 740; 36 L. T. N. S. 442; 25 W. R. 527 - - - - - - - 100
Taylor *v.* Henniker, 12 Ad. & Ell. 488; 9 L. J. Q. B. 383-171, 228, 340
Taylor *v.* Lanyon, 6 Bing. 536 - - - 267, 268, 269
Taylor *v.* Zamira, 6 Taunt. 524 - - - - - 175
Tennant *v.* Field, 8 El. & Bl. 336; 27 L. J. Q. B. 33; 3 Jur. N. S. 1178 - - - - - 226, 228, 229, 239, 294
Therese & Co., Re, W. N. 1879, p. 31 - - - 93, 105
Thomas *v.* Harris, 1 M. & G. 695; 9 L. J. C. P. 308 - 240, 294
Thomas *v.* Mirehouse, 19 Q. B. D. 563 - - - - 276
Thomas *v.* Patent Lionite Co., L. R. 17 Ch. D. 250; 50 L. J. Ch. 544; 29 W. R. 596; 44 L. T. N. S. 392 - - 93, 105, 106, 108
Thomas Brown, Ex parte, L. R. 3 Q. B. D. 545; 47 L. J. M. C. 208 - - - - - - - - 408
Thompson *v.* Field, Cro. Jac. 499 - - - - 164, 167
Thompson *v.* Jackson, 1 Man. & G. 242 - - - - 308
Thompson *v.* Mashiter, 1 Bing. 283; 8 Moore, 254 - 126, 134, 136
Thompson *v.* Ward, L. R. 6 C. P. 327, 360 - - - 158
Thompson *v.* Wood, 4 Q. B. 493 - - - - - 340
Thorn *v.* Woollcombe, 3 B. & Ad. 586 - - - 42, 282
Thornton *v.* Adams, 5 M. & S. 38 - - - - 200, 279
Thorp *v.* Hurt, W. N. 1886, p. 96 - - - 165, 184
Threr *v.* Barton, Moore, 94 - - - - - 40, 282
Thunder *v.* Belcher, 3 East, 450 - - - - 87, 92
Thurgood *v.* Richardson, 4 C. & P. 481; 7 Bing. 428- 268, 273, 275
Thwaites *v.* Wilding, L. R. 11 Q. B. D. 421; 12 Q. B. D. 4; 52 L. J. Q. B. D. 734; 53 ibid. 1; 49 L. T. N. S. 201, 397 - - 161
Tidey *v.* Mollett, 16 C. B. N. S. 298; 33 L. J. C. P. 235- - 10
Till, Ex parte, Re Mayhew, L. R. 16 Eq. 97; 42 L. J. Bkcy. 84; 21 W. R. 574 - - - - - - 82, 94
Timmins *v.* Rowlinson, 3 Burr. 1603; 1 W. Bl. 533 - - 178
Tinckler *v.* Prentice, 4 Taunt. 549 - - - - - 164
Tolman *v.* Portberry, L. R. 6 Q. B. 245; 7 Q. B. 344; 40 L. J. Q. B. 125; 41 ibid. 98 - - - - - - 189
Tomlinson *v.* Day, 2 B. & B. 680 - - - - - 22
Toms *v.* Luckett, 5 C. B. 23; 17 L. J. C. P. 27 - - - 159
Toplis *v.* Grane, 5 Bing. N. C. 636; 9 L. J. C. P. 180; 7 Scott, 620 - - - - - - 82, 214, 217
Townson *v.* Tickell, 3 B. & A. 31 - - - - - 63
Tracey *v.* Talbot, 6 Mod. 214 - - - - - 169
Traders' North Staffordshire Carrying Co., In re, L. R. 19 Eq. 60; 31 L. T. N. S. 716 - - - - -104, 106, 108

PAGE

Trappes *v.* Harter, 2 Cr. & M. 177 - - - - - 122
Trent *v.* Hunt, 9 Exch. 14; 17 Jur. 899; 22 L. J. Ex. 318 - 81, 90, 210, 228, 229, 362
Tresham's Case, 9 Co. Rep. 110b - - - - - 314
Tress *v.* Savage, 4 E. & B. 36; 23 L. J. Q. B. 339 - - 10
Trevanion's Case, 11 Mod. 32 - - - - - 313
Trevillian *v.* Pine, 11 Mod. 112 - - - - 214, 362
Tummons *v.* Ogle, 6 El. & Bl. 571; 25 L. J. Q. B. 403 - - 357
Turner *v.* Allday, 1 Tyr. & Gr. 819 - - - - 166
Turner *v.* Barnes, 2 B. & S. 435; 31 L. J. Q. B. 170; 10 W. R. 561; 9 Jur. N. S. 199 - - - 60, 88, 187
Turner *v.* Cameron, L. R. 5 Q. B. 306; 29 L. J. Q. B. 125; 22 L. T. N. S. 525 - - - - - 10, 33, 123
Turner *v.* Ford, 15 M. & W. 212; 15 L. J. Ex. 215 - - - 313
Turner *v.* Lee, Cro. Car. 471 - - - - - 58
Turner *v.* Turner, 2 B. & B. 111; 4 Moore, 666; 1 Bro. Ch. Rep. 316 - - - - - - - 41, 358, 372
Tutter *v.* Fryer, Winch. 7; Dale's Rep. 42 - - - 185
Tutton *v.* Darke, 5 H. & N. 647; 29 L. J. Ex. 271; 2 L. T. N. S. 361 - - - - - - - - 184, 221
Twells *v.* Colville, 2 Wils. 377 - - - - 273, 355
Tynemouth Union *v.* Overseers of Backworth, 4 T. L. R. 492 - 381

U.

Universal Disinfector Co., L. R. 20 Eq. 162 - - - 104

V.

Valpy *v.* Manley, 1 C. B. 594 - - - - - 175
Vaspor *v.* Edwards, 1 Ld. Raym. 719; 1 Salk. 248; 12 Mod. 662; Holt. 256 - - - - - -234, 235, 305, 306
Vaughan *v.* Davis, 1 Esp. 257 - - - - 200, 333
Vaughan *v.* Hancock, 3 C. B. 766 - - - - - 32
Vertue *v.* Beasley, 1 Moo. & R. 21 - - - - 293
Vigar *v.* Dedman, 24 L. T. N. S. 734 - - - - 373
Vigers *v.* Dean of St. Paul's, 14 Q. B. 909 - - - 52
Vincent *v.* Godson, 24 L. J. Ch. 122- - - - - 32
Vitale, In re, Ex parte Young, 47 L. T. N. S. 480 - 37, 43
Voisey, Ex parte, Re Knight, L. R. 21 Ch. D. 442; 52 L. J. Ch. 121; 47 L. T. N. S. 362; 31 W. R. 19 - - - 99, 100

W.

PAGE

Waddilove *v.* Barnet, 2 Bing. N. C. 538 - - - - 91
Wade *v.* Baker, 10 East, 495; 1 Ld. Raym. 131 - - - 76
Wade *v.* Marsh, Latch. 211 - - - - 43, 57
Wagstaffe *v.* Clarke, Camb. Sum. Ass. 1826- - - - 302
Wake *v.* Hall, L. R. 8 App. Cas. 195; 48 L. T. N. S. 839 - 122
Wakeman *v.* Lindsey, 14 Q. B. 625; 19 L. J. Q. B. 166 - - 227
Walker's Case, 3 Cro. Rep. 22; 1 Roll. Rep. 331; Moore, 203 - 22
Wallace *v.* King, 1 H. Black. 13 - - - - 251, 330
Waller *v.* Andrews, 3 M. & W. 312 - - - - - 284
Wallis *v.* Hewet, Guildhall Sittings, H. Term, 59, 2 - - 377
Wallis *v.* Savill, 2 Lutw. 1532 - - - 68, 172, 173, 287
Walmsley *v.* Milne, 7 C. B. N. S. 115 - - - 122, 123
Walrond *v.* Hawkins, L. R. 10 C. P. 342; 44 L. J. C. P. 116 - 189
Walsh *v.* Lonsdale, L. R. 21 Ch. D. 9 - - - - 9
Walsh *v.* Rose, 6 Bing. 638; 4 M. & P. 484 - - - 151, 284
Walsh *v.* Southwell, L. M. & P. 91; 6 Ex. 150; 20 L. J. M. C. 164 - - - - - - - 386, 388
Walter *v.* Rumbold, 1 Ld. Raym. 55; 4 Mod. 76; 1 Salk. 247 - 194, 227, 237, 254, 331
Ward *v.* Countess of Dudley, 57 L. T. N. S. 20 - - - 122
Ward *v.* Day, 4 B. & S. 337; 5 B. & S. 359; 33 L. J. Q. B. 3, 254- 30, 35, 189
Ward *v.* Haydon, Esp. 552 - - - - - 332
Ward *v.* Henley, 1 Y. & J. 285 - - - - - 373
Ward *v.* Shew, 9 Bing. 608; 2 M. & Scott, 756; 2 L. J. C. P. 58 - 79, 103, 207, 208
Ward *v.* Ventom, 2 Peake, 126 - - - - 332, 335
Warden and Commonalty of Sadler's Case, 4 Co. Rep. 56; Plowd. 227; 2 Vern. 714 - - - - - - 83
Waring *v.* Dewberry, 1 Stra. 97 - - - - 273, 274
Washbourn *v.* Black, 11 East, 405 - - - - 239
Waterfall *v.* Penistone, 6 E. & B. 876; 28 L. J. Q. B. 100 - 122, 123
Waterman *v.* Yea, 2 Wils. 41 - - - - - 372
Watson, Kipling & Co., In re, 49 L. T. N. S. 115 - - - 110
Watson *v.* Main, 3 Esp. 15 - - - - - 198
Watson *v.* Waud, 8 Exch. 339; 22 L. J. Ex. 161 - - 5, 30, 34
Watts *v.* Davis, 1 Selwyn, N. P. 676 - - - - 140
Watts *v.* Thomas, 1 Jur. 719 - - - - - 198
Weatherall and Courthope, In re, 19 L. J. M. C. 115 - 103, 387
Weaver *v.* Price, 3 B. & Ad. 409 - - - - - 383
Webb *v.* Bell, 1 Vent. 36; 1 Sid. 440 - - - - 140

PAGE

Welby *v.* Phillips, 2 Vern. 129 - - - - - 167
Welch *v.* Myers, 4 Camp. 368 - - - - - 200
Wells *v.* Moody, 7 C. & P. 59 - - - - - 340
Wells *v.* Pearcy, 4 L. J. C. P. 144 - - - - - 65
Welsh *v.* Rose, 6 Bing. 638 - - - - - 284
West Hartlepool Colliery Co., In re, 34 L. T. N. S. 568 - - 110
West *v.* Fritche, 3 Ex. 216; 18 L. J. Ex. 50 - - - 88
West *v.* Hedges, 6 M. & G. 1004; Barnes, 211 - - - 269
West *v.* Lascelles, Cro. Eliz. 851 - - - - - 23
West *v.* Nibbs, 4 C. B. 172; 17 L. J. C. P. 150 - 200, 294, 308
Westbourne Grove Drapery Co., In re, L. R. 5 Ch. D. 248 - 105
Westwood *v.* Cowne, 1 Stark. 172 - - - - - 247
Wharton *v.* Blacknell, 12 M. & W. 558; 13 L. J. Ex. 112 - 372
Wharton *v.* Naylor, 12 Q. B. 673; 6 D. & L. 136; 17 L. J. Q. B. 278 - - - - - 142, 143, 266, 270
Wheeler *v.* Branscombe, 5 Q. B. 373; 13 L. J. Q. B. 83; D. & M. 406 - - - - - - - - 175
Wheeler *v.* Stevenson, 6 H. & N. 155; 30 L. J. Ex. 46; 3 L. T. N. S. 702 - - - - - - - 38, 192
White *v.* Binstead, 13 C. B. 304 - - - -270, 274, 279
White *v.* Greenish, 11 C. B. N. S. 209; 8 Jur. N. S. 563 - - 287
White *v.* Heywood, 5 T. L. R. 115 - - - - 202
White *v.* Smale, 22 Beav. 72; 26 Beav. 191 - - - - 80
Whitehead *v.* Taylor, 10 Ad. & Ell. 210; 2 P. & D. 367; 9 L. J. Q. B. 65; 4 Jur. 247 - - - - 60, 214, 362
Whiteman *v.* King, 2 H. Bl. 4 - - - - - 64, 300
Whitley *v.* Roberts, McClel & You. 107 - - - - 50
Whitlock's Case, 8 Co. Rep. 70, 141 - - - - 13
Whitworth *v.* Maden, 2 C. & K. 517 - - - - 248, 330
Whitworth *v.* Smith, 1 Moo. & Rob. 193 - - - 330, 340
Wickham *v.* Lee, 12 Q. B. 521 - - - - - 178
Wicks *v.* Dennis, 1 Lev. 190 - - - - - 182
Wilcoxon *v.* Searby, 29 L. J. Ex. 154 - - - - 142
Wilde *v.* Waters, 16 C. B. 637 - - - - - 330
Wilder *v.* Speer, 8 Ad. & Ell. 547; 7 L. J. Q. B. 249; 3 N. & P. 536 - 234
Wilkinson *v.* Ibbett, 2 F. & F. 300 - - - - 151
Williams *v.* Hayward, 1 E. & E. 1040; 28 L. J. Q. B. 374 - 22, 42
Williams *v.* Holmes, 8 Exch. 861; 22 L. J. Ex. 283; 21 L. T. R. 64 - - - - - - 19, 135, 169
Williams *v.* Jones, 11 Ad. & Ell. 643 - - - - 333
Williams *v.* Lewsey, 8 Bing. 28; 1 M. & S. 92 - - - 271
Williams *v.* Morris, 8 M. & W. 488 - - - - - 256
Williams *v.* Price, 3 B. & Ad. 695; 1 L. J. K. B. 258 - 235, 306

PAGE
Williams *v.* Roberts, 7 Exch. 618 - - - - 200, 201
Williams *v.* Stiven, 9 Q. B. 14; 15 L. J. Q. B. 321; 10 Jur. 804- 33, 38, 185
Williams, Ex parte, Re Thompson, L. R. 7 Ch. D. 138; 47 L. J. Bank. 26; 26 W. R. 274; 37 L. T. N. S. 764 - - 97, 100
Willis, In re, Ex parte Kennedy *v.* D'Eresby, 21 Q. B. D. 384; 58 L. T. N. S. 892; 59 L. T. N. S. 749; 4 T. L. R. 550; 36 W. R. 639, 793 - - - - - - 101
Willis *v.* Fletcher, Cro. Eliz. 530 - - - - - 301
Willoughby *v.* Backhouse, 2 B. & C. 823; 4 D. & Ryl. 539- 324, 335
Wilmot *v.* Rose, 3 E. & B. 563; 23 L. J. Q. B. 281 - - - 255
Wilson *v.* Davenport, 5 C. & P. 531 - - - - 285
Wilson *v.* Duckett, 2 Mod. 61 - - - - - 138
Wilson *v.* Nightingale, 8 Q. B. 1034; 15 L. J. Q. B. 309- 227, 228
Wilton *v.* Dunn, 17 Q. B. 299 - - - - 88, 175
Wiltshear *v.* Cottrell, 1 E. & B. 674 - - - - 122
Winter's Case, 2 Roll. Abr. 448 - - - - - 171
Winterbourne *v.* Morgan, 11 East, 395 - - - 252, 328
Wintle *v.* Freeman, 11 A. & E. 547 - - - - - 269
Witty *v.* Williams, 12 W. R. 755; 10 L. T. N. S. 457 - 18, 170
Wood *v.* Clarke, 1 Cr. & J. 484; 1 Tyr. 315; 1 Price, 26 - 125, 126, 127, 150
Wood *v.* Hewett, 8 Q. B. 913 - - - - - 123
Wood *v.* Leadbitter, 13 M. & W. 838 - - - - 255
Wood *v.* Manley, 11 A. & E. 34 - - - - - 255
Wood *v.* Nunn, 5 Bing. 10; 2 M. & P. 27; 6 L. J. C. P. 198 - 225
Wood *v.* Tate, 2 New Rep. 247 - - - - - 85
Woodcock *v.* Titterton, 12 W. R. Q. B. 685 - - 179, 193
Woodcraft *v.* Thompson, 3 Lev. 48 - - - - 237, 334
Woodgate *v.* Knatchbull, 2 T. R. 154 - - - - 204
Woods *v.* Durrant, 16 M. & W. 149; 16 L. J. Ex. 313 - - 239
Woollaston *v.* Stafford, 15 C. B. 278 - - - - 289
Woolley *v.* Clark, 5 B. & Ald. 745, 746 - - - - 61
Wootley *v.* Gregory, 2 You. & J. 536 - - - 81, 210, 229
Wootten *v.* Harvey, 6 East, 75 - - - - - 404
Wormer *v.* Biggs, 2 C. & K. 31 - - - - - 305
Wray *v.* Earl of Egremont, 4 B. & Ad. 122; 2 L. J. K. B. 48 - 93
Wright *v.* Dewes, 1 Ad. & Ell. 641; 3 L. J. K. B. 181 - - 143

Y.

Yates *v.* Eastwood, 6 Exch. 805; 20 L. J. Ex. 303 - 263, 325
Yates *v.* Ratledge, 5 H. & N. 249; 29 L. J. Ex. 117 - 269, 271, 275

PAGE

Yates *v.* Tearle, 13 L. J. Q. B. 289; 6 Q. B. 282; 8 Jur. 774 - 320

Yeoman *v.* Ellison, L. R. 2 C. P. 681; 36 L. J. C. P. 326; 17 L. T. N. S. 65 - - - - - 30, 32, 35

Young *v.* Brompton, Chatham & Gillingham Waterworks Co., 1 B. & S. 675; 31 L. J. Q. B. 14 - - - 354, 355

Young, Ex parte, In re Vitale, 47 L. T. N. S. 480 - - 37, 43

Z.

Zouch *d.* Ward *v.* Willingale, 1 H. Bl. 311 - - - - 190

TABLE OF STATUTES CITED.

PAGE

25 Hen. III. c. 21 359
51 Hen. III. st. 4 146, 331, 334
52 Hen. III. c. 4 236, 334
c. 15..193, 195, 301, 322
c. 21..... 343
3 Hen. IV. 16a 349
13 Edw. I. st. 1, c. 37 207
c. 2 343, 371
18 Edw. I. c.1 14, 17, 51
28 Edw. I. st. 3, c. 12 334
30 Edw. III. c. 27 299
46 Edw. III. 26, b. 7 220
2 Hen. VII. v. b. 342
5 Hen. VII. ix. b. 230
7 Hen. VIII. c. 4, s. 3..... 365
21 Hen. VIII. c. 19, s. 3..... 365
27 Hen. VIII. c. 10 7, 51, 69
32 Hen. VIII. c. 1 61
c. 28 52
c. 37, s. 1.. 55, 57, 59, 60, 63, 118
s. 3 78
s. 4 53, 57
1 & 2 Ph. & M. c. 12, s. 1.... 236, 331
s. 2 262
s. 3 343
31 Eliz. c. 5 237
43 & 44 Eliz. c. 2, s. 4 374, 393
21 Jac. I. c. 4, s. 2 237
12 Car. II. c. 24.....76, 77
s. 5 19
17 Car. II. c. 7, s. 2 365, 366
s. 4..... 287
17 Car. II. c. 27 344
22 Car. II. c. 6, s. 79 84
2 Will. & M. c. 5..125, 230, 238, 243, 244, 316
sess. 1, c. 5, s. 2 .. 162, 227, 242, 246, 249, 256, 262, 294, 307, 325, 331, 346, 347
sess. 1, c. 5, s. 3 .. 138, 139, 241, 249, 337
sess. 1, c. 5, s. 4 .. 316

PAGE

2 Will. & M. sess. 1, c. 5, s. 5 .. 323
4 Anne, c. 16 20
s. 9..... 55
7 Anne, c. 12, s. 3 118
s. 6 118
8 Anne, c. 14..118, 163, 187, 188, 189, 194, 202, 273, 274, 276, 281
s. 1 142, 266, 267, 270, 278, 289
s 2 196
s. 6.. 53, 57, 185, 187, 188, 270
s. 7.. 53, 57, 185, 187, 188, 270
s. 8 267
4 Geo. II. c. 28.. 52, 53, 68, 238, 282
s. 5 .. 14, 15, 17, 20, 41, 62, 63, 85, 138
s. 6 43, 116
11 Geo. II. c. 19, s. 1 .. 139, 187, 196
s. 2 197
s. 3 202
s. 4 202
s. 5 203, 206
s. 7 197, 201
s. 8 .. 66, 123, 195, 241, 249, 329, 331, 337, 348
s. 10..238, 241, 262
s. 15 26
s. 18....38, 39, 177
s. 19 . 246, 307, 326, 327, 338
s. 20 327, 334
s. 21 332
s. 23 343
17 Geo. II. c. 38, s. 4 376
s. 7 376, 391
s. 11 375
24 Geo. II. c. 44, s. 6 348, 405
22 Geo. III. c. 83, s. 8 391
33 Geo. III. c. 54, s. 15 407
c. 55 396
s. 1 405

PAGE

38 Geo. III. c. 5, s. 17..... 75
41 Geo. III. c. 23, s. 2..... 388, 391
s. 3..... 389
s. 8..... 389, 391
42 Geo. III. c. 90, s. 61 403
43 Geo. III. c. 99, s. 33 396
s. 37 276
54 Geo. III. c. 170, s. 12 378, 392
56 Geo. III. c. 50, s. 1 144, 273
s. 3..... 144
s. 6..... 144
57 Geo. III. c. 93.. 246, 256, 259, 262
s. 1..... 341
s. 2..... 257
s. 4..... 258
s. 6 ..209, 261, 331
59 Geo. III. c. 12, s. 17 86
c. 86, s. 7..... 195
1 & 2 Geo. IV. c. 23, s. 1 51
3 Geo. IV. c. 121, s. 41 408
4 Geo. IV. c. 95, s. 75..... 241
7 & 8 Geo. IV. c. 17..... 259
10 Geo. IV. c. 44 326
c. 56, s. 27 408
s. 28 407
1 & 2 Will. IV. c. 41, s. 19 348
3 & 4 Will. IV. c. 27 49, 179
s. 2 .. 178, 179, 180
s. 34 179
s. 42 .. 178, 180
c. 42, s. 3 178
s. 37 .. 58, 59, 78, 188
s. 38 .. 58, 188
s. 42..... 60
c. 74 52
4 & 5 Will. IV. c. 22, s. 2 26
5 & 6 Will. IV. c. 50 393
c. 59, s. 1 232
s. 4.. 233, 234, 307, 308
s. 5 231
s. 19 234
6 & 7 Will. IV. c. 71, s. 2 71
s. 37..... 71
s. 81..... 71
s. 82.... 72, 73
s. 84..... 73
s. 85..... 73
7 Will. IV. & 1 Vict. c. 26..... 76
c. 69..... 70
1 & 2 Vict. c. 64 70
c. 106 86
2 & 3 Vict. c. 47, s. 67..... 201
c. 62 70
s. 13..... 74
c. 71, s. 39..... 163, 325

PAGE

2 & 3 Vict. c. 93, s. 8 348
3 & 4 Vict. c. 15, s. 15..... 70, 74
4 & 5 Vict. c. 38 26
5 & 6 Vict. c. 54 70
c. 97, s. 2..... 72, 317
6 & 7 Vict. c. 23, s. 2 7
c. 30, s. 1 317
s. 2 319
s. 3 319
s. 4 319
c. 40, s. 18..... 154
s. 19..... 154
c. 67, s. 3 383
7 & 8 Vict. c. 96, s. 67 267
8 Vict. c. 18, s. 119 26
8 & 9 Vict. c. 15, s. 5 254
c. 20, s. 115 297
s. 116 297
c. 106, s. 3 8, 10
s. 9 43, 117
9 & 10 Vict. c. 73 70
c. 95, s. 96.... 146, 151, 163
s. 119.... 359, 360
10 & 11 Vict. c. 15, s. 14..... 155
c. 104 70
11 & 12 Vict. c. 14, s. 18..... 401
c. 43, s. 11..... 375
s. 17..... 411
s. 18..... 400
s. 19....399, 401, 402, 403
s. 20... 402
s. 21.... 405, 406
s. 22..... 409
s. 23..... 409
s. 24..... 401
s. 26..... 400
s. 27....347, 404, 409, 410
s. 28..... 404
s. 29..... 406
s. 55..... 402
c. 44, s. 3 407
s. 4 383
s. 5 384, 394
12 & 13 Vict. c. 14, s. 1 385, 393
s. 2 386, 387
s. 3 382, 393
s. 4 382, 394
s. 5 378, 382
s. 6 388, 394
c. 45, s. 5 347, 410
c. 49, s. 1 26
c. 67 86
c. 92, s. 5 231
s. 6..232, 314, 315
13 & 14 Vict. c. 99 393

PAGE
14 & 15 Vict. c. 25, s. 1..44, 186, 273
s. 2 125, 113
15 & 16 Vict. c. 76, s. 41..... 364
s. 210 190
s. 212 191
16 & 17 Vict. c. 70, s. 113 77
17 & 18 Vict. c. 32 26
c. 60, s. 1..231, 232, 347
cc. 97 and 116 26
18 & 19 Vict. c. 13, s. 129 77
c. 15, s. 12..... 15
s. 14..... 15
19 & 20 Vict. c. 97, s. 5 286
c. 108, s. 35 52
s. 63 351
s. 64 318
s. 75 .. 112, 278
c. 120, s. 35 52
20 & 21 Vict. c. 43 390
21 & 22 Vict. c. 73, s. 5 409
22 & 23 Vict. c. 35, s. 10..... 25
23 & 24 Vict. c. 93 70
c. 126, s. 22 353
s. 23 366
s. 24 366
24 & 25 Vict. c. 10, s. 16.... 142, 279
c. 96 209
25 & 26 Vict. c. 82, s. 1 378
c. 89, s. 85 93, 104, 105, 106
s. 87....104, 105, 106, 111
s. 163 .. 104, 105, 106, 111
c. 102, s. 96 176
27 & 28 Vict. c. 181, s. 35 393
30 & 31 Vict. c. 59 196
c. 131 93
c. 142, s. 13 150
31 & 32 Vict. c. 40 49
c. 122, s. 39 378
32 & 33 Vict. c. 41, s. 18..... 376
c. 62, s. 4 410
s. 34.. 93, 94, 95, 97, 102
s. 42, sub-s. 1 94
33 & 34 Vict. c. 35, s. 1 26
ss. 2, 4, 7.... 27
c. 97 215
s. 38, sub-s. 1 245
sub-s. 2 245
34 & 35 Vict. c. 79.....119, 130
s. 1 156
s. 2 157
s. 3 157
35 & 36 Vict. c. 50, s. 3 151, 153
s. 4 152
s. 5 152
PAGE
35 & 36 Vict. c. 50, s. 6 152
c. 92, s. 13.... 243, 246
36 & 37 Vict. c. 42 70
c. 66, s. 24, sub-s. 7 321
s. 25, sub-s. 5 90
s. 34..... 280
37 & 38 Vict. c. 83 321
38 & 39 Vict. c. 57, s. 1 178
c. 66 156
c. 77, s. 10..93, 105, 373
s. 25, sub-s. 8 295
39 & 40 Vict. c. 17, ss. 3, 4, 5 .. 49
c. 61, s. 31..... 386
40 & 41 Vict. c. 18 52
41 & 42 Vict. c. 31, s. 6 100
c. 42 70
42 & 43 Vict. c. 49, s. 21..... 399
sub-s. 2 400
sub-s. 3 402
s. 31, sub-s. 2 207
s. 32..... 207
s. 39, sub-s. 4 404
s. 43, sub-s. 1 404
sub-s. 2 411
sub-s. 3 411
sub-s. 4 411
sub-s. 5 411
sub-s. 6 412
sub-s. 7 412
sub-s. 8 412
s. 47..... 375
c. 59 143
43 & 44 Vict.
c. 19, s. 86 395, 396
s. 87 396, 397
s. 88 277
s. 89 397
s. 90 397
s. 105, sub-s. 1..397, 398
sub-s. 3..397, 398
sub-s. 4..397, 398
44 & 45 Vict. c. 24, s. 5 412
c. 41 296
s. 10 24
sub-s. 2. 24
s. 14 9
s. 44 14, 42
sub-ss. 1, 2 70
c. 59 287
s. 3 367
c. 75, s. 1, sub-s. 2. 78
s. 24..... 78
45 & 46 Vict. c. 38, s. 58, sub.s. 1 (i) and (vii) 52
c. 43, s. 14..... 382
c. 75 349
46 & 47 Vict. c. 52, s. 42 .. 82, 96, 99
sub-s. 1 93

	PAGE
46 & 47 Vict. c. 52, s. 42, sub-s. 2	93
s. 44, sub-s. 2 (iii)	100
s. 142	96
c. 61	210, 211
s. 44	180
s. 45	145, 147
s. 46	149
s. 47	177
s. 48	150
s. 49	259, 260
s. 50	244, 260
s. 51	249, 251
s. 52	210, 260
s. 54	180
47 & 48 Vict. c. 43	319
s. 4	258
49 & 50 Vict. c. 27, s. 4	76
51 & 52 Vict. c. 21	53, 259
s. 4	140, 145, 151, 162, 163, 188, 400
s. 5	239, 256
s. 6	243, 249, 347
51 & 52 Vict. c. 21, s. 7	207, 210
s. 8, sub-s. 2.	256
s. 9	244
c. 43	150
s. 108	352, 354, 372
s. 109	353, 370, 373
s. 120	364
s. 123	364
s. 129	368
s. 130	369
s. 132	369
s. 133	359
s. 134	344, 351
s. 135	351, 364
s. 136	352, 359
s. 137	352, 368, 370
s. 147	146, 151
s. 160	142, 278
s. 188	146, 151, 163

THE LAW OF DISTRESS.

PART I.

OF A DISTRESS FOR RENT.

CHAPTER I.

OF RENTS IN RELATION TO A DISTRESS.

SECT. I.—*Of Rents generally.*

Origin of rent.

IT is not our intention to discuss at any length the origin of rent. Suffice it to say that, like the means of its recovery by distress, it can be traced to the ancient system of English tenures, when land was generally held by military service (*a*).

Subinfeudation.

It is well known that after the Norman Conquest a large proportion of our territory was appropriated by the Conqueror and distributed amongst his followers, and, as a return, he required them to hold these gifts, or *feuds*, as they were called, subject to the performance of certain military duties as the condition of their enjoyment (*b*). The feudatories, being under frequent incapacities of cultivating their own lands, in time found themselves obliged to commit part of them to inferior tenants. Hence arose subinfeudation, which was nothing more than an imitation by the inferior lords of the tenures under which their superiors held, by carving out and granting to others still

(*a*) 2 Bl. Com. 57; Bullen, p. 17.

(*b*) 1 Hallam's Middle Ages, 178, 179, n.

Part I. Chap. I.

more minute estates, to be held as of themselves; at the same time reserving such services as would remunerate them for those which they were liable to render to their superiors. These services, which were of a base kind, consisted of returns, or *reditus*, of corn, cattle, or money, and were the origin of rent (*c*).

Definition of rent.

The word rent, or render (*reditus*), signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance (*d*). It is defined to be "a certain profit issuing yearly out of lands and tenements corporeal," and may be regarded as of a twofold nature—first, as something issuing out of the land in respect of which it is granted or reserved; and secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure (*e*).

Essentials of a rent.

(a) Must always be a profit.

(b) Need not be in money.

Rent must always be a profit; yet there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters, may be, and occasionally are, rendered by way of rent (*f*); it may also consist in services and manual operations; as to plough so many acres of ground, and the like; which services, in the eye of the law, are profits. So, where a tenant holds premises by the service of cleaning the parish church, without any pecuniary render, such service is "*a rent*," for which a distress may be made. So, also, the service under the like circumstances of ringing the church bell at stated hours from Michaelmas to Christmas (*g*). But in such case the distress cannot be sold.

(*c*) 2 Bl. Com. 57.

(*d*) Kerr's Coms. vol. 2, p. 35.

(*e*) Bradby, 24; 2 Bl. Com. 41; Co. Litt. 142 a; Gilb. Rents, 9; Smith, L. & T. 111, 2nd ed.

(*f*) 1 Inst. 142 a.

(*g*) *Doe* d. *Edney* v. *Billett*, 7 Q. B. 976; *Doe* d. *Robinson* v. *Hinde*, 2 Moo. & R. 441 (holding lands by the service of keeping up a grindstone for the convenience of a parish); *The Duke of Marlborough* v. *Osborn*, 5 B. & S. 67 (team work); *Lanyon* v. *Carne*, 2 Saund. 165; Smith, L. & T. 111, 112, 2nd ed.

Rent must issue out of the land, and not be part of the land itself; so that grass, herbage, or other vesture, cannot properly constitute a rent, because they are part of the thing demised (*h*). In the case of mines, however, it seems that a rent may consist of a portion of the ore, which is the substance of the land itself (*i*). As we have observed, it is necessary that rent should issue out of lands and tenements corporeal; that is, "from some inheritance whereunto the owner of the rent may have recourse to distrain" (*k*). Consequently, it cannot issue out of a piscary, common, franchise, or other incorporeal hereditament (*l*); and the agreement of the parties cannot alter the law in this respect (*m*); nor can it issue out of a rent itself (*n*), a hundred, fair, or advowson (*m*), nor out of a personal chattel (*o*). But rent reserved on a lease of land with stock upon it, or on the demise of a ready furnished house, or lodgings, can be distrained for, because, in contemplation of law, the whole rent issues out of the land or premises demised (*p*). The produce of land, however, such as vesture or herbage, is so far of a corporeal nature, that it enables the person entitled to the rent to enter and distrain cattle upon the land (*q*).

(c) Must issue out of the thing demised.

(d) Cannot issue out of an incorporeal hereditament.

Furnished lodgings.

An exception to this rule occurs in the case of the Crown, which, by its prerogative, is entitled to distrain on all the lands of the lessee; whereas a subject can only distrain upon the land demised (*r*).

Except in the case of the Crown.

(*h*) Co. Litt. 47 a, 142 a; Gilb. Rents, 26.

(*i*) *Campbell* v. *Leach*, Amb. 740; *Buckley* v. *Kenyon*, 10 East, 139; *R.* v. *E. Pomfret*, 5 M. & S. 139; but see also *R.* v. *Inhabitants of St. Anstell*, 5 B. & A. 693.

(*k*) Gilb. Rents, 20; Co. Litt. 47 a, 144 a.

(*l*) Co. Litt. 47 a, 144 a.

(*m*) *Butt's case*, 7 Co. Rep. 23; Bullen, 19.

(*n*) 2 Roll. Abr. 446.

(*o*) *Spencer's case*, 5 Co. Rep. 17.

(*p*) *Newman* v. *Anderton*, 2 New Rep. 224; Brad. 26. See also *Robinson* v. *Learoyd*, 7 M. & W. 48; Brad. 16.

(*q*) Co. Litt. 47 a.

(*r*) Co. Litt. 47 a; Bac. Abr. Rent (B.); *Knight's case*, Co. Rep. 54; *Lord Mountjoy's case*,

Part I. Chap. I.

Rent must also issue *yearly;* though there is no occasion for it to issue every successive year; for it may be reserved every second, third, or fourth year; but, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold and enjoy them, it ought in general to be reserved yearly, because those profits annually arise, and are annually renewed.

(e) Must issue yearly.

As it is necessary that rent should be reserved out of a corporeal hereditament, so it is essential to the nature of a rent or service that it be *certain* in its quantity, extent, and time of payment—or that which may be reduced to a certainty by either party (*s*), for "*id certum est quod certum reddi potest*" (*t*). In some cases there may be "a certainty in uncertainty;" as a man may hold of his lord to shear all the sheep depasturing within his lord's manor; and this is certain enough, although the lord has sometimes a great, and sometimes a small number therein (*u*). So where the proprietor of a house, marl-pit, and brick mine, demised the house by unwritten agreement to a tenant from a day named; and it was at the same time agreed between them that the tenant should take the marl-pit, and brick mine, and should pay quarterly a *certain* sum for what he got out of it; and the tenant having taken the marl and made bricks, and paid the stipulated amount for a certain time, fell into arrear; the Court held that the agreement for the marl-pit and brick mine was a demise of the land from year to year at a rent capable of being *ascertained with certainty*, and for which, therefore,

(f) Must be certain.

5 Rep. 4; Bro. Abr. Distresses, pl. 49. Where also a rent is reserved upon an entire demise of land and tithes, it seems that, although it be entire as to render, yet, as to the remedy, it issues out of the land alone, and is distrainable accordingly. *Doubitofte* v. *Curteene*, Cro. Jac. 452; *Croom* v. *Talbot*, Comb. 238; *Newman* v. *Anderton*, 2 New R. 224.

(*s*) Co. Litt. 96 a.

(*t*) *Orby* v. *Mohun*, 2 Vern. 531, 542; Co. Litt. 96 a.

(*u*) Co. Litt. 96 a.

the lessor might distrain (*x*). And a royalty payable to a landlord upon the bricks which are made out of a brick-field is a rent certain, although it is not paid for the renewing produce of the land, but for portions of the land itself, which is gradually exhausted by the working (*y*). But where, by an indenture of demise, there was a stipulation that the tenant should not sell hay off the premises, under a penalty of 2*s*. 6*d*. per yard of the hay so sold, to be recovered by distress, as for rent in arrear; it was held by the Court of Exchequer Chamber that the legal operation of this demise was to create a penalty, recoverable by distress, *as for rent*, but *not* a rent (*z*). And where the owner of a factory let "standings" in some of his rooms for lace machines, he himself supplying the steam power by which they were put in motion; it was held that there was no demise of the room, and consequently that the weekly payments reserved could not be distrained for as "rent" (*a*); though in a somewhat similar case, where the owner of lace machines hired a portion of a room in a factory, and this portion was *divided from the rest of the room by a partition*, and the owner of the machines kept the key, it was held that there was a sufficient demise to entitle the landlord to distrain (*b*). On the other hand, it has been held, that where a lease of tithes and land was granted at an entire rent, and was void as to the tithes, because not under seal, a distress was altogether unlawful, because no distinct rent was due for the land (*c*). And therefore a rent reserved *after the rate* of 18*l*. per year was held bad for uncertainty, in not specifying the nature of

(*x*) *Daniel* v. *Gracie*, 6 Q. B. 145. See judgment in *Watson* v. *Waud*, 8 Ex. at p. 339; *Edmonds* v. *Eastwood*, 2 H. & N. 826.

(*y*) *Reg.* v. *Westbrook*, 10 Q. B. 178.

(*z*) *Pollitt* v. *Forrest*, 11 Q. B. 949.

(*a*) *Hancock* v. *Austin*, 14 C. B. N. S. 634.

(*b*) *Selby* v. *Graves*, L. R. 3 C. P. 594.

(*c*) *Gardiner* v. *Williamson*, 2 B. & Ad. 336; *Neale* v. *Mackenzie*, 1 M. & W. 747.

Part I. Chap. I.

the rent, whether in money or in kind, nor the periods of its payment (*d*).

For the same reason the lord formerly could not distrain upon a tenant in frankalmoign, because his duty was to perform divine services, uncertain both in time and number (*e*).

Sect. II.—*Of the several Kinds of Rent.*

Having now shortly discussed the origin and nature of rent, and the common requisites which are necessary for its existence, in so far as it affects the law of distress, we will proceed to examine the different kinds of rent which are met with at common law, though the distinctions which used to exist are not now of such importance.

There are at common law three distinct kinds of rent, namely, rent-*service*, rent-*charge*, and rent-*seck* (*f*).

(a) Rent-service. Origin of.

Rent-service was created where the tenant held land of his lord "by fealty, and a certain rent, or by a certain rent, together with homage, fealty, or other services" (*g*). It was called rent-service, because it had some corporal service, as fealty at the least, belonging to it (*h*). And to rent-service distress was incident of common right, whether such rent were created by deed or parol (*i*), provided that the reversion were in the landlord, or lessor, making the distress (*k*). The copyhold rents paid by the tenants of a manor to the lord for their tenements holden by copy of court roll, having fealty incident to them, are in their very nature rent-service (*l*).

Distress incident of common right.

(*d*) *Parker* v. *Harris*, 4 Mod. 78.

(*e*) Litt. s. 136.

(*f*) Bac. Abr. Rent, (A); Smith, L. & T. 112, 114, 2nd ed.

(*g*) Litt. s. 213.

(*h*) Co. Litt. 142 a.

(*i*) Litt. s. 214.

(*k*) Litt. s. 215 a; Co. Litt. 143 a.

(*l*) *Laugher* v. *Humphrey*, Cro. Eliz. 524. As to rent reserved upon a tenancy at will, see *Hamerton* v. *Stead*, 3 B. & C. 483; *Knight* v. *Ben-*

Essentials of a rent-service.

Must be reserved on a sufficient conveyance.

It is essential to the nature of a rent-service that it be reserved on a sufficient conveyance; that is, upon some demise or grant, either passing an estate to the tenant, or enlarging an estate already in him (*m*). For although a reservation may be made either by an indenture or by deed poll, or by parol even (if within the exception of the Statute of Frauds), provided an estate—either in possession, reversion, or remainder—be made to pass to the tenant, yet any reservation in a deed, by which no estate passes, is void; although a right, without an estate, may pass by the same deed (*n*).

At common law a rent could not be reserved upon a bargain and sale, because only a use, and no estate in the land, passed by such conveyance. But now, by the Statute of Uses (*o*), the possession being executed to the use, the bargainor may distrain for the rent (*p*).

Agreements for future leases.

An agreement for a future lease at a certain rent, under which a tenant takes possession, no lease being in fact executed, and no other circumstances existing under which a demise of any estate, or any consequent tenancy, can be implied, is not a sufficient reservation of rent to give the proposed lessor a right to distrain (*q*). Thus, where a tenant was in possession under a memorandum of agreement to let on lease, with a purchasing clause for twenty-one years at a net clear rent of 63*l*., the tenant being allowed to enter at any time on or before a particular day; it was held that this only amounted to an agreement for a future lease, and that, no lease having been executed, and no rent subsequently paid, the landlord was not entitled to

nett, 3 Bing. 361; Bullen, 20, note. Rent granted in consideration of the enfranchisements of copyholds by virtue of 6 & 7 Vict. c. 23, s. 2, is expressly declared to be rent-service, and to be parcel of, and appendant and appurtenant to, the manor of which the enfranchised copyholds were parcel.

(*m*) Co. Litt. 144 a; Bac. Abr. Rent (C).

(*n*) Bac. Abr. Rent (C); Bradby, 18.

(*o*) 27 Hen. 8, c. 10.

(*p*) Co. Litt. 144 a.

(*q*) Bradby, 18; Bullen, 22.

distrain (*r*). And again, if under an agreement for a lease at a rent certain, the tenant is let into possession before the lease is executed, the lessor cannot during the first year distrain for rent; for there is no demise, express or implied (*s*). If a lease had been tendered to the occupier, and he had refused to execute it, the lessor might have ejected him without any notice to quit; and if he had executed it, he would thenceforth have held, not under the supposed demise, but under the lease. If a person chooses to enter upon premises under an agreement for a lease, without a stipulation that in case no lease is executed he shall hold for one year certain, the landlord may turn him out without notice. The effect is that the lessor cannot distrain for the rent; he must bring his action for use and occupation (*t*).

Whether an instrument amounts to a present demise, or operates only as an agreement for a future letting, has always been a question of great doubt. But since the passing of the 8 & 9 Vict. c. 106, s. 3, this question has occurred, and will occur, less frequently in practice. For that Act prevents any writing *not under seal* from operating as a lease, where by law a writing is necessary to constitute a lease (*u*). But it is still important to determine whether an agreement operates as a lease, or as an agreement for one. For the instrument, if it be construed as a lease, passes an estate in the land to the lessee, and enables the lessor to distrain for the rent reserved; whereas, construed as an agreement, it passes no estate *at law*, nor can the intended lessor distrain, unless the intended lessee, after his entry upon the land, pay rent according to the terms of the agreement (*v*). This seems, however, to have

(*r*) *Dunk* v. *Hunter*, 5 B. & Ald. 322.

(*s*) *Hegan* v. *Johnson*, 2 Taunt. 148.

(*t*) See *Regnart* v. *Porter*, 7 Bing. 451; *Hamerton* v. *Stead*, 3 B. & C. 478.

(*u*) Smith, L. & T. 3rd ed. p. 96.

(*v*) *Mann* v. *Lovejoy*, Ry. & Moo. 355; Sm. L. & T. 3rd. ed. pp. 96, 98; *Martin* v. *Smith*, L. R. 9 Ex. 50.

been questioned in a recent case, where it was laid down that since the Judicature Acts the rule no longer holds, that a person occupying under an executory agreement for a lease is only made tenant from year to year at law by the payment of rent; but that he is to be treated in every Court as holding on the terms of the agreement: and therefore that a person holding under an agreement is subject to the same rights of distress as if a lease had been granted, and if under the terms of the lease a year's rent would have been payable in advance on demand, a distress for that is lawful (*x*). The above case has been recently reviewed in the case of *Swain* v. *Ayres* (*y*), where an agreement was made that a tenant was to expend a certain sum of money in repairs on the demised premises, and that when such repairs were done a lease should be executed. No lease, however, was executed, and it was held that the agreement did not constitute a "lease" within the meaning of sect. 14 of the Conveyancing and Law of Property Act, 1881, and therefore that forfeiture could be enforced without serving upon the tenant the notice required by the above section.

The real question in such cases is whether the parties intended to create a tenancy before the execution of any further instrument. An instrument containing an express proviso that it shall not operate as a lease, but only as an agreement, will be construed to be a mere agreement, notwithstanding that it contains words of present demise (*z*). The usual words of demise are "demise lease and to farm let." But any other words which are sufficient to explain the intention of the parties, that the one shall divest himself of the exclusive (*a*) possession, and the other assume it for a determinate time, whether such words run in the form

(*x*) *Walsh* v. *Lonsdale*, L. R. 21 Ch. D. 9.

(*y*) L. R. 20 Q. B. D. 585; 21 Q. B. D. 289.

(*z*) *Perring* v. *Brook*, 7 C. & P. 360.

(*a*) *R.* v. *Morrish*, 32 L. J. M. C. 245; *Taylor* v. *Caldwell*, 3 B. & S. 826; *Handcock* v. *Austin*, 14 C. B. N. S. 634.

Part I. Chap. I.

of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a demise. The leaning of the Courts now seems to be to construe writings not under seal, which cannot, by reason of the 8 & 9 Vict. c. 106, operate as leases, as *agreements*, in order to carry out the intention of the parties (*b*). If any doubts arise on the instrument the conduct of the parties may be referred to, in order to explain their intention (*c*). And even where the tenant only enters under an agreement for a lease, the subsequent circumstances may be looked to, in order to ascertain whether an actual tenancy has been constituted. Thus, in the case of *Martin* v. *Smith* (*d*), where, by an agreement not under seal, the plaintiff agreed to let to the defendant, and the defendant to take of the plaintiff a house and premises for seven years, upon the terms, *inter alia*, "that the defendant would, in the last year of the term, do certain paintings and whitewashings," and the defendant entered under the agreement, occupied and paid rent for the whole of the seven years; it was held that the stipulation as to painting, &c., was applicable to a tenancy from year to year, and that his occupying under the agreement amounted to a promise that if he should continue to occupy for the whole term, he should perform what was stipulated in such agreement (*e*).

In another case A. agreed in writing to let a farm to B. The agreement reserved a rent payable at stated intervals, and provided that A. should put the premises in repair. B. alleged that, prior to the agreement being signed, A.

(*b*) Sm. L. & T. 3rd ed. p. 97; L. R. 9 Ex. 50; *Tidey* v. *Mollett*, 16 C. B. N. S. 298; *Martin* v. *Smith*, L. R. 9 Ex. 50.

(*c*) *Chapman* v. *Bluck*, 4 Bing. N. C. 187; *Cox* v. *Bent*, 5 Bing. 185; *Knight* v. *Bennett*, 3 Bing. 361; *Doe* d. *Pearson* v. *Ries*, 8 Bing. 181; *Roe* v. *Ashburner*, 5 T. R. 163; Bullen, 23.

(*d*) L. R. 9 Ex. 50.

(*e*) See also *Turner* v. *Cameron*, L. R. 5 Q. B. 306; *Parker* v. *Taswell*, 2 De G. & J. 559; *Tress* v. *Savage*, 4 E. & B. 36.

promised verbally that if B. would take the farm, the buildings should be put into a thorough state of repair, and that no rent should be demanded until this was done, and that on the faith of this promise B. took the farm. A. afterwards mortgaged the premises to C., who gave B. notice of the mortgage, and that the principal and interest were in arrear, and directed him to pay the rent to C. B. then set up the alleged collateral agreement of which C. was previously unaware. C., after notice, distrained for the rent reserved by the unwritten agreement, and due before and after the date of his mortgage. In an action by B. against C. for an injunction to restrain him from holding or selling the goods, and for damages for improperly distraining, and against A. and C. for specific performance of the written agreement, and the alleged parol agreement, Malins, V.-C., on the motion of the plaintiff, and subject to certain terms, granted an interlocutory injunction, restraining C. from remaining in possession, and from selling for a certain time. It was held that the injunction ought not to have been granted; for that, assuming that the parol agreement existed, the mortgagee of the reversion, without notice, was not bound by it. *Semble*, that a court of equity will not interfere with the legal right of distraint by the owner of the reversion for the rent due to him on the contract of tenancy, even where the distraint is for more money than is due as rent (*f*).

To whom and how a rent-service must be reserved.

Rent must be reserved to the lessor himself.

It must be observed that rent can only be reserved to the lessor himself, and not to a stranger (*g*), the reason being that it is a compensation for the land, and should be reserved to the person who would have had the land if it had not been demised (*h*). It must also be reserved con-

(*f*) *Carter* v. *Salmon*, 43 L. T. N. S. 490.

(*g*) Litt. s. 346; Co. Litt. 214; Com. Dig. tit. "Rent" (B.), 5.

(*h*) Sm. L. & T. 3rd ed. 127; Gilb. Rents, 61.

Part I. Chap. I.

formably to the nature of the estate; for in some cases a bad reservation will destroy the rent. So, where a lease for years was made by a tenant in fee simple, and his son, who was his heir apparent, to commence after the death of the father, reserving rent to the son "by name," but not reserving it to the "heir" or heirs of the father; it was held that the son could not take the rent, although it turned out that he *was* heir, and would have been entitled to it had it been reserved in proper form; for a reservation to the son by his "proper name," and not to him as "heir," is the same as if it was to a stranger (*i*). An improper reservation, however, will not in general destroy the rent, for "the law uses all imaginable industry to conform the reservation to the estate" (*j*). Thus, if a lessee for 100 years should underlet for 50 years, reserving a rent for him and his heirs during the term, this rent, it seems, will go to the executor (*k*). Or, if a rent-charge for years be granted to a man and his heirs, it will go to his executors (*l*). Where by a lease rent was reserved to a person, *not a party to the lease*, and the lessees covenanted with him and the lessors to pay rent, it was held that he could not join with the lessors in an action of covenant for non-payment of the rent (*m*). If a tenant in tail make a lease, and reserve the rent generally to his heirs, it will go to his heirs in tail (*n*); and if two joint tenants demise by parol or deed-poll, reserving rent to *one* of them, it will enure to both (*o*). And if a rent-charge be granted out of gavel-

But not to a stranger.

Must be reserved conformably to the nature of the estate.

Improper reservations.

(*i*) *Oates* v. *Frith*, Hob. Rep. 130; Co. Litt. 47 a, 143 b; Com. Dig. tit. "Rent" (B.), 5. See also *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23; *Chetham* v. *Williamson*, 4 East, 469; *Moore* v. *Earl of Plymouth*, 3 B. & Ald. 66.

(*j*) Per Lord Hale, *Sacheverell* v. *Frogate*, 1 Vent. 162; Gilb. on Rents, 59.

(*k*) *Sacheverell* v. *Frogate*, 1 Vent. 162; Bullen, 25.

(*l*) *Darrell* v. *Wilson*, Cro. Eliz. 644.

(*m*) *Lord Southampton* v. *Brown*, 6 B. & C. 718.

(*n*) *Sacheverell* v. *Frogate*, *sup.*

(*o*) Co. Litt. 47 a. It seems that the Crown is entitled to reserve a rent to a stranger. Bradby, 18.

kind lands to a man and his heirs, it will descend according to the nature of the land (*p*). Where there is no specification of the persons to whom the rent is to be payable, it will by law enure according to the nature of the estate (*q*). But where there is a specific reservation of the rent to the lessor, without naming any other persons as heirs or executors to whom it shall be paid afterwards, it will be confined to the person to whom it is so reserved, and will cease altogether at his death; for "*expressum facit cessare tacitum*" (*r*), unless it be reserved payable "during the term," in which case this express evidence of the lessor's intention that the payment of rent should be commensurate in duration with the continuance of the term, will preserve the rent to the end, and the law will distribute it according to the nature of the estate (*s*).

Reservation in case of doubt.

When there is any doubt as to the person to whom the reservation should be made, the clearest and safest way is to reserve the rent *generally during the term* (*without saying to whom*), and leave it to be distributed by the law in the mode pointed out in *Whitlock's case* (*t*). For if the reservation of rent be general, the law directs it to be paid according to the intent and the nature of the thing demised. In such case the rent is carried over to the person who would have succeeded to the estate if no such lease had been made (*u*). It seems that where the reservation is to a stranger, although the payment reserved is not properly speaking a rent, and at common law cannot be distrained for, yet such a reservation is binding as a contract (*x*). And if such a reservation comes within the

(*p*) *Randall* v. *Jenkins*, 1 Mod. Rep. 110; Bradby, 19; Bullen, 25.

(*q*) Shep. Touch. 114; *Sacheverell* v. *Frogate*, *sup.*

(*r*) *Cother* v. *Merrick*, Hard. 95.

(*s*) *Sacheverell* v. *Frogate*, 1 Vent. 162; Bullen, 26; Bradby, 20.

(*t*) 8 Co. R. 70, 141.

(*u*) Gilb. Rent, 64, 71; Wood. L. & T. 10th ed. 344.

(*x*) *Jewel's case*, 5 Rep. 3; Sm. L. & T. 3rd ed. 128.

Part I. Chap. I.

Conveyancing Act, 1881.

statute 44 & 45 Vict. c. 41, s. 44 (the Conveyancing and Law of Property Act, 1881), the stranger will be entitled to distrain when the payment is in arrear for twenty-one days. By that Act it is provided that—"any annual sum payable half-yearly, or otherwise, whether charged on the land, or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, may be distrained for if twenty-one days in arrear, unless an intention contrary to such a power is expressed in the instrument under which the annual sum arises" (*y*). But this section applies only where the instrument comes into operation after the 31st of December, 1881.

Must be incident to the reversion.

It is necessary for the existence of a rent-service that the person to whom it is payable should be entitled to the reversion (*z*). Originally a rent-service might have been reserved upon a conveyance of lands from one man to another in fee simple, or for any lesser estate (*a*); but by the statute of *Quia Emptores* (*b*) upon a grant of land in fee simple the grantee holds not of the grantor, but of the person of whom the grantor himself held; therefore a rent-service cannot now be reserved upon a grant of lands from one subject to another in fee simple; because it is incidental to tenure, and there is now no tenure between the grantee under such a conveyance and the grantor. If such a rent were created at the present day without a power of distress, it would be a *rent-seck*, and a power of distress would accordingly be conferred by the statute 4 Geo. II. c. 28 (*c*). But a rent-service may be reserved upon the grant of a *lesser* estate.

Quia Emptores.

(b) Rent-charge. How created.

The next species of rent which we will treat of is a rent-charge, which is created either by *grant*, where the owner

(*y*) Sect. 44.
(*z*) Litt. s. 215; Co. Litt. 142 b, 143 a.
(*a*) These are now called "quit rents," *post*, p. 17.
(*b*) 18 Edw. 1, c. 1.
(*c*) See *post*, p. 20.

of land by deed grants a yearly rent to be issuing out of the same land to another in fee, or for life, or years, with a clause in the deed empowering the grantee, or his heir, to distrain, if the rent be in arrear; or by *reservation*, as where a man conveys away his estate, leaving no reversion in himself, and reserves to himself and his heirs a certain rent with a clause of distress (*d*). This was called a rent-*charge*, because the land is liable to the distress not of common right, but by virtue of the clause in the deed (*e*). A rent-charge cannot continue longer than the estate of the grantor; but if he is seised in fee simple, he may make a grant of such a rent for any estate he pleases, as for a term of years, for life or lives, in tail, or in fee simple (*f*). As a rent-charge is a separate incorporeal hereditament, a deed is necessary, unless it be created by will.

Why so called.

Formerly rent-charges were required to be enrolled; but now it is provided by the statute 18 & 19 Vict. c. 15, ss. 12, 14, that, after the 26th of April, 1855, they shall not affect the lands, unless they are registered as in the Act mentioned. An exception occurs in the case of rent-charges created by marriage settlement, or will, for a life or lives, or for any estate determinable on a life or lives. A grant in fee reserving a perpetual rent, with an express power of distress, is good as a rent-charge (*g*). As we have said above, if such a rent were created at the present day, without a power of distress, it would apparently be a rent-seek, and as such attended with the right of distress under the statute 4 Geo. II. c. 28. In ancient times it was necessary to give an express power to the grantee to distrain on the premises out of which the rent-charge was to issue.

Enrolment formerly necessary.

Registration.

(*d*) Litt. s. 218.

(*e*) Litt. s. 217; *Bradbury* v. *Wright*, 2 Doug. 628; *Jemott* v. *Cowley*, 1 Saund. 113.

(*f*) Litt. ss. 217, 218; Wms. R. P. 12th ed. 330.

(*g*) Co. Litt. 143 b, note 5; and see judgment of Buller, J., in *Bradbury* v. *Wright*, 2 Doug. 624.

Part I. Chap. I.

But this is now provided for by the last-mentioned statute, which gives a power of distress to rents-seek (*h*).

(c) Rent-seck. Definition.

Rent-seek (*redditus siccus*), or barren rent, like a rent-charge, is created by grant or reservation, and arises where a rent is granted by deed or will, to be issuing out of certain lands, without any clause of distress (*i*), or where a man reserves a rent to himself and his heirs on the alienation of his whole estate, without any such power of distress (*k*). It was called rent-*seek* because no distress could formerly be made for it (*l*); and the only way in which it differs from a rent-charge is, that no distress is charged upon the land out of which it issues. The separation of the rent from the reversion had in many cases the effect of reducing a rent-service to a rent-seek. Thus if a man granted to another a rent-service by deed, reserving to himself the reversion, and the tenant attorned to the grantee; or if the rent were separated from the fealty or other services; such rent was in the hands of the grantee only a rent-seek (*m*). And if the lord attempted to convey his rent independently of the reversion to which it was incident, the grant would have been effectual to deprive himself of the rent, but not to enable his grantee to distrain for it (*n*).

Why so called.

How it differs from a rent-charge.

Severance from the reversion.

(d) Fee-farm rent.

There are some other species of ancient rents besides those which we have already considered, such as fee-farm rents, rents of assize, and chief rents. These rents, though strictly comprised within one or other of the preceding divisions, are yet known by particular names; but with relation to the remedy of distress, all rents, of whatever

(*h*) *Post*, p. 20.

(*i*) Litt. s. 218; 2 Bl. Com. 42.

(*k*) Litt. s. 217.

(*l*) Litt. s. 218.

(*m*) Litt. ss. 225, 228; Co. Litt. 150 b, 153 a, 164 b.

(*n*) Litt. ss. 225—228; Bradby, 20. (As to whether a rent-seek can issue out of a mere chattel, see Bullen, App. A.)

description, are reducible to one or other of the above divisions, namely, rent-service, rent-charge, or rent-seck.

Definition.

A *fee-farm rent* is a rent reserved on a conveyance of lands in fee simple, the name being founded on the perpetuity of the farm or rent, and not on the amount (*o*). If created before the Statute of *Quia Emptores* (*p*), such a rent seems to be a rent-service with fealty attached to it (*q*). If created after that statute, it seems to be in the nature of a rent-charge, if reserved with a clause of distress, and a rent-seck, if reserved without it (*r*). So that if created in modern times, distress would only be incident to the latter kind of rent under the statute 4 Geo. II. c. 28.

Effect of *Quia Emptores*.

(e) Rents of assize, chief-rents, and quit-rents.

Rents of assize are, "the certain established rents of the freeholders and ancient copyholders of a manor, and which cannot be departed from"; those of the freeholders are frequently called chief-rents, and both sorts are indifferently denominated quit-rents, because thereby the tenant goes "quit and free" of all other services (*s*).

(f) Copyhold rents.

Are in their very nature rent-service.

Copyhold rents are those paid by the tenants of the manor to the lord for their tenements holden by copy of court roll. As fealty was always incident to this species of tenure, these rents are in their very nature rent-services, and as such have always been considered to be distrainable of common right (*t*).

(g) Rent payable in advance.

Sometimes rent is made payable from quarter to quarter, or otherwise, *in advance* (*u*). It cannot be recovered in

(*o*) Co. Litt. 143 b, note 5; 2 Inst. 44; *Governors of Christ's Hospital* v. *Harrild*, 2 M. & G. 713, note; Bullen, 30.

(*p*) 18 Edw. 1, c. 1.

(*q*) Spelm. Gloss. voce Feodi Ferma; Terms de la Ley, voce Fee Farm.

(*r*) Co. Litt. 144 a, note 5; *Bradbury* v. *Wright*, Doug. 627.

(*s*) 2 Bl. Com. 41; Gilb. Rents, 38; Co. Litt. 144; Harg. n. 5; 2 Inst. 19.

(*t*) *Laugher* v. *Humphrey*, Cro. Eliz. 524.

(*u*) *Harrison* v. *Barry*, 7 Price, 690.

The reservation must be clearly expressed.

advance in an action for use and occupation (*x*). But a distress may be made, or an action maintained for such rent, as soon as it becomes payable according to the terms of the demise (*y*). Such reservation should be clearly expressed to be payable from time to time in advance, otherwise it may perhaps be construed as applicable to the first quarter only (*z*). Where premises were let, the "yearly rent to be 110*l.*, and to be payable in advance if the landlord required the same," nothing being said as to the days of payment, and after a quarter had expired the landlord demanded a quarter's rent only; it was held that he was not entitled to distrain for the whole 110*l.* (*a*). But where it was a condition in the lease of a farm that a tenant should pay the last half-year's rent in advance, which last half-year's rent should be considered as reserved and due on the 29th of September preceding, if the landlord should see cause for such demand; it was held that the rent was due on the 29th of September, but that the landlord could not distrain for it without notice of his election and demand that it should be paid (*b*). And again, where the defendant let premises to a tenant from June 15th, 1815, for five years at a yearly rent of 100*l.* to become due and payable in advance, if demanded, by equal quarterly payments on the 15th of September, December, March, and June respectively in every year, "provided always that if the yearly rent thereby reserved, or any part thereof, should be in arrear for twenty-one days next after any of the days thereby appointed for payment thereof in advance, being first lawfully demanded at any time after the said twenty-one days, and not paid when demanded," then the lessor should have power to re-enter, &c., and no

(*x*) *Angell* v. *Randall*, 16 L. T. N. S. 489.

(*y*) *Jenner* v. *Clegg*, 1 Moo. & Rob. 213; *Lee* v. *Smith*, 9 Exch. 662; *Morton* v. *Woods*, L. R. 4 Q. B. 293; *Ex parte Hale, In re Binns*, L. R. 1 Ch. 285.

(*z*) *Holland* v. *Palser*, 2 Stark. 161; *Hopkins* v. *Helmore*, 8 A. & E. 463.

(*a*) *Clarke* v. *Holford*, 2 C. & K. 540; Woodf. L. & T. 12th ed. 348.

(*b*) *Witty* v. *Williams*, 10 L. T. N. S. 457.

rent was demanded until August, 1852, when, upon its not being paid, the defendant distrained; it was held that the construction of this demise was, that the rent was payable in advance, but that it was not to be actually paid until demanded, and therefore that the defendant was entitled to distrain (*c*).

(h) Rents distrainable of common right. How created.

Besides the different kinds of rent which we have mentioned, there are a few rents of a special nature which do not strictly fall within any of the above denominations. These have been called *rents distrainable of common right* (*d*); such are rents granted by one co-parcener to another for equality of partition; or to a widow out of land of which she is dowable in lieu of dower (*e*); or where a rent is granted in lieu of lands upon an exchange, or reserved on a tenancy at will; in all these cases the rents may be distrained for of common right (*f*); but if the grantee assign over, neither he nor the assignee can sue for arrears due before the assignment.

12 Car. 2, c. 24, s. 5.

The statute 12 Car. II. c. 24, s. 5, which abolished military tenures, provides that nothing therein contained shall be construed to take away any rents certain, or other service, incident or belonging to tenure in common socage, or the fealty and distress incident thereunto; and such relief shall be paid in respect of such rents as is paid in case of the death of a tenant in common socage.

It will be seen, therefore, that anciently at common law the remedy of distress was applicable, or not, to the recovery of a rent according to the particular kind to which such rent belonged, namely, to one or other of the three kinds of rent-service, rent-charge, or rent-seek. And so this continued (with the exception of certain statutory

(*c*) *Williams* v. *Holmes*, 22 L. J. Ex. 283; and see *Mallam* v. *Arden*, 10 Bing. 299, as to the necessity of demand for rent previous to a distress, and *post*, pp. 165, 164, 181—183.

(*d*) Co. Litt. 141 b.

(*e*) *Coll* v. *Bishop of Coventry*, Hob. 140 and 153.

(*f*) Bullen, 31.

Part I. Chap. I.

provisions enabling certain persons to distrain for rent who could not before distrain at common law) until the passing of the statute 4 Geo. II. c. 28, s. 5, by which it was enacted that "there shall be the like remedy by distress in cases of reck-seck, rents of assize, and chief rents, which had been duly paid for the space of three years, within the space of twenty years before the first day of the session in which the Act was passed (23rd January, 1731), or *which should be thereafter created*, as in case of *rent reserved upon lease*."

4 Geo. 2, c. 28, s. 5.

Distress now incident to every species of rent.

Distress, therefore, is now incident to every species of rent, either of common right, or by virtue of a charge, or by force of the statute 4 Geo. II. c. 28; provided, in the case of rents-seck, rents of assize, and chief rents, that they have been created since that statute, or that they have been paid during the time and within the period therein prescribed. In *Musgrave* v. *Emmerson* (*g*) there was no evidence that certain rents had been paid for the space of three years *continuously* within the space of twenty years before the 28th of January, 1727; and it was held that it is sufficient if the rent was paid for the space of three *whole* years within twenty years before the passing of the Act, though those years may not be consecutive. A previous fee-farm rent may be distrained for under this statute, provided it is brought within this section (*h*).

Seisin of rent.

It was also formerly necessary that the party distraining should have a *seisin* of the rent, without which there was no privity between him and the tenant; but since the statute 4 Anne, c. 16 (which rendered attornment in future unnecessary), the doctrine of seisin with relation to a distress for rent has become nearly obsolete, although it may possibly come into question in some cases, as in a distress for an ancient rent-charge created before the statute of Anne (*i*).

(*g*) 10 Q. B. 326.

(*h*) *Dodds* v. *Thompson*, L. R. 1 C. P. 133; *Bradbury* v. *Wright*, 2 Doug. 624; *Musgrave* v. *Emmerson*, 10 Q. B. 326.

(*i*) Bradby, 21.

CHAPTER II.

OF THE APPORTIONMENT OF RENT.

It now becomes necessary to deal shortly with the subject of apportionment of rent.

Apportionment is divided into two classes,—viz., in respect of estate, and in respect of time. With regard to the latter, various provisions of the legislature have helped to simplify what was previously an intricate and difficult subject.

We will first consider the law of apportionment of rent in respect of estate.

(a) Apportionment of rent in respect of estate.

As soon as a rent comes into existence it is at all times liable not only to be apportioned, but also to be suspended, extinguished, or discharged; and as the remedy of distress is entirely dependent upon the existence of the rent, it will be easily seen how important it is to bear these distinctions in mind.

Definition of apportionment.

According to Sir E. Coke, "apportionment" signifies "a division or partition of a rent, common, &c., or a making of it into parts;" but it has been better defined as "frequently not denoting division, but distribution; and in its ordinary technical sense, the distribution of one subject in proportion to another previously distributed" (*a*).

As regards rent-service.

A rent-service being something given by way of return to the lessor for the use of the land demised, if the tenant is by any means deprived of the land demised, his obligation to pay the rent ceases (*b*).

(*a*) *Huntley* v. *Roper*, 1 Anderson, 21; *Ex parte Smyth*, 1 Swanst. 338, n.; Woodfall's L. & T. 10 ed. 361.

(*b*) 3 Cruise, T. 28, c. 3, s. 1.

Apportionment on the alteration of the lessee's interest.

Resumption or purchase of the tenancy by the lord causes an extinguishment of the rent (*c*). If, however, a person who has a rent-service purchases *part* of the land from which it issues, the rent will be extinguished only as to the part purchased, and the amount which will in future have to be paid will be apportioned according to the value of the land (*d*). So likewise, if a lessee for life, or years, surrender part of the land to the lessor (*e*), or the lessor enter upon part of the land for a forfeiture in part, the rent will be apportioned (*f*). It seems, also, that where part of the land is lost to the lessee by the act of God, he may insist that the rent be apportioned; as where the sea breaks in and overflows a part of the land (*g*).

On purchase of tenancy.

By a surrender.

By act of God.

Eviction of lessee.

Apportionment also takes place where the tenant under a lease has been evicted of part of the land out of which the rent issues by a person having *title paramount* to that of the lessor (*h*). But where lands and goods are let at an entire rent, and the tenant is evicted from the lands, no apportionment of the rent can be made for the *goods*, as rent issues from the land alone (*i*). In *Salmon* v. *Mathews* (*k*), however, it appears to have been thought that the rent might be apportioned; but the case was decided on the ground that there was evidence for the jury to infer a fresh agreement to pay for the use of the goods (*l*).

(*c*) 3 Cruise, T. 28, c. 3, s. 3.

(*d*) Litt. s. 222; *Clun's case*, Tudor's L. C. Conv. 3rd ed. 310.

(*e*) Co. Litt. 148 a; *Smith* v. *Malings*, Cro. Jac. 160.

(*f*) *Stevenson* v. *Lombard*, 2 East, 580; *Walker's case*, 3 Cro. Rep. 22.

(*g*) 1 Rolle's Abr. 236; I. 46.

(*h*) Co Litt. 148 a; *Tomlinson* v. *Day*, 2 B. & B. 680; *Stevenson* v. *Lombard*, *supra*. The establishing of a right of common on land demised is not an eviction of a tenant, as the soil is not recovered. *Jew* v. *Thirkwell*, 1 Ch. Cas. 31; Bullen, 35, n. 5.

(*i*) *Emott's case*, Dyer, 212 b; *Collins* v. *Harding*, Cro. Eliz. 606; *Cadogan* v. *Kennett*, Cowp. 432; Gilb. Rents, 175; *Williams* v. *Haywood*, 1 E. & E. 1040.

(*k*) 8 M. & W. 827.

(*l*) H. Smith's L. & T. p. 172.

In all these cases rent-service is apportioned on the *alteration of the lessee's interest;* but it is also apportionable on the *severance of the lessor's reversion*, and this takes place in two ways—either by the act of law, or the act of the parties.

Apportionment of rent on severance of the lessor's reversion.

Thus, by *act of law;* where lands demised at an entire rent become divided amongst different persons; as where freehold and leasehold lands are let together at one rent, an apportionment takes place at the death of the lessor amongst the real and personal representatives (*m*). In like manner, where a man leases one acre of borough English tenure and another of gavelkind by one demise, and having two sons, dies (*n*); and where a husband leases for years reserving rent, and dies, and the widow recovers a third part of the reversion for her dower (*o*); in these cases the law apportions the rent in the same manner as it disposes of the reversion (*p*).

By act of law.

So also, where the reversion is severed by *act of the parties.* If the lessor grant or devise part of the reversion to a lessee, or to a stranger, the rent which is incident to the reversion will be apportioned (*q*), but the lessee's concurrence to the apportionment is necessary, unless it be settled by a jury (*r*).

By act of parties.

Or where the tenant upon the performance of a condition, or otherwise, acquires the reversion in part of the land.

By the Conveyancing and Law of Property Act,

Conveyancing Act, 1881.

(*m*) *Huntley* v. *Roper*, 1 And. 21; *Moody* v. *Garnon*, 1 Roll. Abr. 237; Bullen, p. 36.

(*n*) *Rushton's case*, Dy. 4 b; *Ewer* v. *Moyle*, Cro. Eliz. 771.

(*o*) 1 Roll. Abr. 237.

(*p*) Bullen, 36, 37.

(*q*) Co. Litt. 148 a; *West* v. *Lascelles*, Cro. Eliz. 851; *Collins* v. *Harding*, 13 Co. 57 a; Gilb. 173; *Stevenson* v. *Lombard*, 2 East, 580; *O'Connor* v. *O'Connor*, 4 I. R. Eq. 483; Tudor's L. C. Conv. 3rd ed. 310.

(*r*) *Bliss* v. *Collings*, 5 B. & A. 876; Woodfall's L. & T. 10th ed. 361.

Part I. Chap. II.

1881 (*s*) (which seems to add nothing to the rights given by the common law to legal owners of reversions), "rent reserved by a lease shall be annexed and incident to, and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered by the person from time to time entitled, subject to the term, to the income of the whole, or any part, as the case may require, of the land leased." (By sub-sect. 2, this section applies only to leases made after the commencement of this Act.)

No apportionment where tenant not liable to payment of the whole amount.

No apportionment of rent can take place where a rent-service has been so reserved that the tenant never became liable to the payment of the whole amount. Thus, where a lessor demised by parol certain premises for a year, and the lessee accepted the lease and entered upon a part of them, and found another person in possession of part of the demised premises under a previous lease from his lessor; and this person continued to occupy that part in exclusion of the lessee until the expiration of the first half year, although the lessee occupied the remainder; it was held that the demise was wholly void, the rent not being apportionable, and that the lessor was not entitled to distrain for the whole rent or any part of it (*t*).

As regards a rent-charge.

Formerly a rent-charge was governed by very different rules from those which regulated the apportionment, suspension, and extinction of rent-service. For the grants of rent-charges, being in their origin of no benefit to the public, but against common right, and contrary to the policy of the common law, and moreover tending to lessen the tenant's ability to render his feudal services, the law from the earliest times carried them into execution so far

(*s*) 44 & 45 Vict. c. 41, s. 10. (*t*) *Neale* v. *Mackenzie*, 1 M. & W. 747.

only as they took effect, strictly, and according to the original intention of the particular grantor in each instance (*u*).

Difference between rent-charge and rent-service.

There is a most important difference between the effect of a purchase of *part* of the land in the case of a rent-service and a rent-charge. For if a rent-charge issuing out of certain lands was vested in a man and his heirs, and he purchased *part* of the land in fee, the rent-charge would have been extinguished, upon the ground laid down by Lord Coke (*x*), that "the rent is entire, and against common right, and issuing out of every part of the land (*y*); and therefore by purchase of part it is extinct in the whole, and cannot be apportioned."

So, where a person having a rent-charge out of land released part of such land from the rent, the whole rent would be extinguished under the old law, because it issued out of the whole of the land; but he might have released part of the rent-charge without extinguishing the whole; as "the grantee deals only with that which is his own, namely, the rent and not the land" (*z*).

22 & 23 Vict. c. 35, s. 10.

Now, by the statute 22 & 23 Vict. c. 35, s. 10, the "release from a rent-charge of part of the hereditaments charged therewith, shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming such release" (*a*). It is doubtful whether this Act extends to implied releases, or to those by operation of law.

(*u*) Bullen, 38.

(*x*) Co. Litt. 147 b.

(*y*) Litt. 222; 3 Cruise, T. 28, c. 3, ss. 13, 14; Burton, s. 1121; 2 Jarm. & Byth. by Sweet, 60.

(*z*) 18 Vin. Abr. Rent, 504; 3 Cruise, Dig. 301; Co. Litt. 148. See Bullen, pp. 40, 41.

(*a*) *Clun's case,* Tudor's L. C. Conv. 3rd ed. 331. For apportionment under certain

Part I. Chap. II.

We will now consider the law of apportionment of rent *in respect of time.*

(b) Apportionment of rent in respect of time.

Clun's case.

At common law.

At common law, as is laid down in *Clun's case*, there is no apportionment of rent in respect of time; rent not being held to accrue due, like interest, "*de die in diem*," but only to become payable in the event of the accomplishment of the full period upon the expiration of which it is made payable. Thus if a lessor seised in fee, or having a limited interest with a power of leasing, died in the interval between the two days of payment, his personal representatives at common law could not claim the rent up to the time of his death; but it would go as incident to the reversion either to the heir-at-law, devisee, or remainderman, as the case might be (*b*). This caused great inconvenience and injustice; and in the reign of King George the Second a remedy for a proportionate part of the rent, according to the time such tenant for life lived, was given by Act of Parliament to his executors or administrators (*c*). And by another statute (*d*), the executors and administrators of any tenant for life, who had granted the lease since the 16th of June, 1834 (the date of the Act), might claim an apportionment of the rent from the person next entitled when it should become due. This Act, however, did not apply unless the demise were made by an instrument in writing (*e*). And finally, by the Apportionment Act, 1870 (*f*) (which, however, does not repeal these previous statutes), it is provided that after the passing of that Act

The Apportionment Act, 1870.

statutes, see Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18, s. 119); and also 4 & 5 Vict. c. 38; 12 & 13 Vict. c. 49, s. 1; 17 & 18 Vict. cc. 32, 97, 116.

(*b*) *Earl of Strafford* v. *Lady Wentworth*, 1 P. Wms. 180; *Lord Rockingham* v. *Penrice*, Salk. 578; *Norris* v. *Harrison*, 2 Madd. 268; Tudor's L. C. Conv. 3rd ed. p. 301.

(*c*) 11 Geo. 2, c. 19, s. 15.

(*d*) 4 & 5 Will. 4, c. 22, s. 2.

(*e*) *Cattley* v. *Arnold*, V.-C. W., 7 W. R. 245; *Mills* v. *Trumper*, L. R. 4 Ch. 320.

(*f*) 33 & 34 Vict. c. 35, s. 1.

(which took place on the 1st of August, 1870), "all rents and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing, or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." By sect. 2 of this Act, "the apportioned part of any such rent, &c., shall be payable or recoverable in the case of a continuing rent," &c., "when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent," &c., "determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not been so determined, and not before." By sect. 4, "all persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances), as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively; provided that such persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this Act, or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this Act to the same." By sect. 7, "the provisions of this Act shall not extend to

Part I. Chap. II.

any case in which it is or shall be expressly stipulated that no apportionment shall take place."

Having now treated on the subject of rent, we will turn our attention to the remedy given by law for its non-payment; namely, distress.

CHAPTER III.

WHO MAY DISTRAIN.

We will now consider the various persons who are entitled to distrain for arrears of rent, either in respect of their estate, or interest in the property distrained upon. A power of distress implies an antecedent right of action (*a*).

Distress being of very ancient origin, and immemorially known to the common law, exists in very many cases; and is not only confined to those in which the relationship of landlord and tenant is established. But as the instances where the right of distress is employed occur far the most frequently between landlord and tenant, we propose to discuss their rights with relation to each other in the first place, before proceeding to treat upon the former cases.

(a) Actual demise at a fixed rent.

It is an established rule that a landlord has no right to distrain unless there be an "*actual demise at a fixed rent.*" Therefore where a tenant was in possession under a memorandum of agreement to let on lease, with a purchasing clause for twenty-one years, at a net clear rent of 63*l.*, the tenant to enter at any time on or before a particular day; it was held that this only amounted to an agreement for a future lease, and that no lease having been executed, and no rent subsequently paid, the landlord was not entitled to distrain (*b*). So again, if under an agreement for a lease at a rent certain the tenant is let into possession before the lease is executed, the lessor cannot, during the first year,

(*a*) Per Lord O'Hagan in *G. E. Ry. Co.* v. *Harwich* (*Mayor, &c.*), 41 L. T. N. S. 533.

(*b*) *Dunk* v. *Hunter*, 5 B. & Ald. 322.

Part I. Chap. III.

distrain for rent, for there is no demise express or implied (*c*). But if the agreement goes on to say that until the lease shall be executed the rent, covenants, and agreements to be therein contained shall be paid and observed, and the several rights and remedies enforced in the same manner as if it had been actually executed; that will, on entry, create a tenancy at a fixed rent, for which the landlord may distrain when due, although no rent has been paid under the agreement (*d*). And where an intended purchaser, by the contract of sale, agreed to become tenant from week to week to the vendor of the hereditaments agreed to be sold, at a weekly rent to be paid in advance, such provision was held not to be in the nature of a penalty, but that a tenancy existed, and the rent might be distrained for (*e*). But where a tenant entered under an agreement containing stipulations for a lease at 25*l.* a year, and an engagement by the landlord *to complete certain erections*, and the erections were never completed, and the tenant never paid any rent, but being called on after some years' occupation, said he was ready to pay what was due, provided the erections were completed, and an allowance made to him for the expense of some repairs; it was held that a demise at a rent certain could not be implied, so as to entitle the landlord to distrain (*f*). And where P. agreed to let land to H., subject to certain covenants, and the lease was to be granted immediately after P. should obtain a lease of

(*c*) *Hegan* v. *Johnson*, 2 Taunt. 148; *Knight* v. *Bennett*, 3 Bing. 361; *Riseley* v. *Ryle*, 11 M. & W. 16; *Ward* v. *Day*, 5 B. & S. 359; *Watson* v. *Waud*, 8 Ex. 335; *Hancock* v. *Austin*, 14 C. B. N. S. 634.

(*d*) *Anderson* v. *Midland Rail. Co.*, 3 E. & E. 614; *Pinero* v. *Judson*, 6 Bing. 206; *Rollason* v. *Leon*, 7 H. & N. 73.

(*e*) *Yeoman* v. *Ellison*, L. R. 2 C. P. 681. (As to rent paid as compensation for the use of premises converted from one union to the use of another, see *Guardians of Poor of Woodbridge Union* v. *Guardians of Poor of Carlford Union*, 13 Q. B. 269.)

(*f*) *Regnart* v. *Porter*, 7 Bing. 451; *Hopcraft* v. *Keys*, 9 Bing. 613; *Mechelan* v. *Wallace*, 7 Ad. & Ell. 54, n.

the *same premises* from M. under a then subsisting agreement between P. and M., such lease from P. to H. to contain like covenants as those in the lease from M. to P., and such other covenants as were usual in such leases, and H. agreed to pay the rent, as if the lease from P. were already executed, and if H. failed to pay the rent P. was to enter; it was held that the instrument did not amount to a *present* demise, inasmuch as P. appeared by the agreement to have no *present* power to grant the lease; and that, H. having entered and made default in payment, P. could not distrain (*g*). On the other hand, where an agreement between the plaintiff and the defendant referred to a lease which had been granted by the defendant to W., and the plaintiff agreed to become tenant, upon the conditions contained in that former lease; it was held that the terms of the former lease became incorporated in and formed part of the agreement, and that both of them together supported a right on the part of the defendant to distrain for rent (*h*).

Where a tenant wrote to a landlord saying, "I will take the premises for 100*l.* the first year, and afterwards for 110*l.* per annum, payable quarterly, the rent to commence from Michaelmas last," and he then agreed to do certain buildings, to take a lease for twenty-one years under the usual covenants, "*and the whole subject to your being satisfied as to my responsibility, to ascertain which I beg to refer you to M.*," and the landlord wrote saying that the reference was satisfactory, and he accepted him as tenant, and on the tenant's paying him 100*l.* without any valuation being made or lease prepared; it was held that the tenant's letter and the landlord's reply created an *actual demise* with the right to distrain, and that if any doubt as to the right to distrain arose from the correspondence, it was cleared up by the conduct of the parties, to which it was competent

(*g*) *Hayward* v. *Haswell*, 6 Ad. & Ell. 265.

(*h*) *Pearce* v. *Cheslyn*, 5 N. & M. 652.

for the Court to refer; and that when the landlord stated that the inquiry was satisfactory, and he accepted the plaintiff as his tenant, the agreement ceased to be conditional, and became absolute and positive. It was held also, that that which in law purports to be an *actual demise* may be created by two distinct separate instruments, namely, a letter from a tenant to a landlord, and the answer of the latter, it not being essential to the creation of such actual demise that the agreement by which it is created should be contained in any instrument (*i*).

An actual demise may be implied.

An actual demise at a fixed rent may be implied from very slight circumstances. Thus, where a tenant, who had entered on premises under an agreement for a lease, admitted a charge of half a year's rent in an account between him and his landlord; it was held that this was equivalent to payment, and constituted him a tenant from year to year, and made him liable to a distress (*j*). And again, where the plaintiff took possession of premises under an agreement for a lease to him for seven years, at a yearly rent payable half-yearly, but no lease was executed, nor was the quantum of rent to be paid ascertained, and the plaintiff occupied under the agreement for three years and *paid rent* for two; it was held that this created a tenancy from year to year, and entitled the landlord to distrain for the arrears due at the rate previously paid (*k*). A landlord may distrain upon a tenant from week to week at a weekly rent (*l*), and on a tenancy at will, if a yearly rent is reserved (*m*); but he cannot distrain when he has absolutely assigned his interest in the pre-

Weekly tenancy.

(*i*) *Chapman* v. *Bluck*, 4 Bing. N. C. 187.

(*j*) *Cox* v. *Bent*, 5 Bing. 185; *Vincent* v. *Godson*, 24 L. J. Ch. 122; *Mcchelan* v. *Wallace*, 7 A. & E. 49; *Vaughan* v. *Hancock*, 3 C. B. 766; *M'Leish* v. *Tate*, Cowp. 781.

(*k*) *Knight* v. *Bennett*, 3 Bing. 361.

(*l*) *Yeoman* v. *Ellison*, L. R. 2 C. P. 681.

(*m*) Litt. s. 72; *Morton* v. *Woods*, L. R. 4 Q. B. 293.

mises (*n*). If a tenant holds over on sufferance only, as there is then no "agreed rent," or actual tenancy, a distress cannot lawfully be made, but the remedy is by action for use and occupation (*o*).

Tenancy on sufferance.

As we have said before, the rent which is essential to a distress must be *certain;* but a rent is sufficiently certain which may be reduced to certainty by computation (*p*). In *Daniel* v. *Gracie* (*q*), the proprietor of a house, marl-pit, and brick mine, demised the house by an unwritten agreement to a tenant from a day named; and it was at the same time agreed between them that the tenant should take the marl-pit and brick mine, and should pay quarterly a certain sum for what he got out of it; the Court held that this created a demise of the land from year to year at a rent capable of being ascertained *with certainty*, and for which, therefore, the lessor might distrain. Where a lease of tithes and land was granted at an entire rent, and it was void as to the tithes because it was not under seal; it was held that a distress for arrears of rent was altogether unlawful, because there was no distinct rent due for the land (*r*). And where a lease was made *by parol* of 100 acres of land at a certain rent, and the lessee accepted the lease, and entered upon the land, but afterwards found that eight acres had been previously demised by his lessor to another person who was in possession; it was held that the demise was altogether void as to the eight acres, and that the rent could not be apportioned, and, therefore, could not be distrained for (*s*); but it would have been

Rent must be certain.

(*n*) *Parmenter* v. *Webber*, 8 Taunt. 593.

(*o*) *Alford* v. *Vickery*, Car. & M. 280; *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Williams* v. *Stiven*, 9 Q. B. 14.

(*p*) See *ante*, p. 4; *Doe* d. *Edney* v. *Benham*, 7 Q. B. 976; *Selby* v. *Graves*, L. R. 3 C. P. 594, 603; *Turner* v. *Cameron*, L R. 5 Q. B. 306.

(*q*) 6 Q. B. 145.

(*r*) *Gardiner* v. *Williamson*, 2 B. & Ad. 337; see also *Meggison* v. *Lady Glamis*, 7 Exch. 685.

(*s*) *Neale* v. *Mackenzie*, 1 M. & W. 747; *Holgate* v. *Kay*, 1 C. & K. 341.

Part I. Chap. III.

otherwise had the demise been under seal, because that would have operated as a grant of the reversion and its incidents as to the eight acres, and no apportionment of the rent would have been necessary (*t*). And in a later case, where A., by a contract in writing, demised to B. at a yearly rent of 145*l.* from the 14th of May, 1851, certain premises, including a cottage occupied by C. at the rental of 5*l.* a year, and B. took possession of all the premises included in the demise, except the cottage, as C. refused either to go out or attorn to B., and before the day fixed for the first half-yearly payment of rent, A. and B. verbally agreed that A. should receive from C. some arrears of rent, and that A. should pay B. 70*l.* on the 14th of November, 1851, and 70*l.* on May 14th, 1852; it was held that this was a new demise, and that A. was entitled to distrain for the 70*l.* due on the 14th of November, 1851; Pollock, C. B., saying, "It is quite clear that if no new agreement had been come to, then the case of *Neale* v. *Mackenzie* (*u*) would have applied, and the defendant would not have been entitled to distrain; but here the parties came to a fresh agreement" (*x*).

Cases have arisen where there have been doubts whether there was really a *demise* or not, or whether the conclusion to be drawn from the facts was that there was a mere "licence," and the sum payable for the privilege of using such licence not sufficiently in the nature of a rent to support a distress. Thus, in the case of *Hancock* v. *Austin* (*y*) (which we have referred to above), the owner of a factory, fitted up with steam power, let certain rooms in it to persons owning lace machines, and allowed them the privilege of keeping their machines there, or in other words he let them the "standings." The plaintiff was

Mere licence.

(*t*) *Ecclesiastical Commissioners of Ireland* v. *O'Connor*, 9 Irish Com. L. R. 242; *Lake* v. *Dean*, 28 Beav. 607; Woodfall's L. & T. 10th ed. 380.

(*u*) 1 M. & W. 758.

(*x*) *Watson* v. *Waud*, 8 Exch. 335.

(*y*) 14 C. B. N. S. 634.

one of these persons, and he paid to the defendant twelve shillings per week for this permission, stipulating that he was to have the right of free entry for the purpose of seeing that his machines were in order, and working them. It was held that these facts constituted a mere "licence," and not a demise, and that the weekly payments above mentioned could not be distrained for as "rent." But this case was distinguished in the more recent decision of *Selby* v. *Greaves* (*z*), where similar "standings" were let, as in the case of *Hancock* v. *Austin* (*a*), but the portion of the room in which the lace machines were placed *was divided from the rest of the room by a partition, and the hirer kept the key;* it was held from these facts that the relation of landlord and tenant subsisted; Willes, J., observing, that "there was not here the letting of a mere 'standing' for the machinery, but a letting of a defined portion of the room, separated from the rest, with the intention of giving the exclusive occupation to the person to whom it was let."

A licence to get all the copperas stone which may be found in part of a manor for twenty-one years, at the yearly rent of 25*l.*, is not a demise, and will not support a distress for the agreed rent (*b*). The right to distrain may also exist by express agreement between the parties, although the subject-matter in respect of which this power is reserved is not, strictly speaking, a rent. Thus, where by an indenture of demise there was a stipulation that the tenant should not sell hay, &c., off the premises, under a penalty of two shillings and sixpence per yard of the hay so sold, to be recovered by distress as for rent in arrear; it was held that the legal operation of this demise was to create a penalty recoverable by distress *as for rent, but not a rent* (*c*).

(*z*) L. R. 3 C. P. 594.

(*a*) See *supra*.

(*b*) *Ward* v. *Day*, 4 B. & S. 337; 5 B. & S. 359.

(*c*) *Pollitt* v. *Forrest*, 11 Q. B. 949. See also *Yeoman* v. *Ellison*, *supra*, p. 30; L. R. 2 C. P. 681.

Part I. Chap. III.

Right of distress may be postponed by agreement.

On the other hand, the right of distress is not so inseparable an incident to a demise that it cannot be postponed by agreement between the parties. Therefore, where A., a mesne landlord, let premises to an under-tenant by a written agreement, which provided *inter alia* that no distress should be made till after A. had produced the receipt of his superior landlord for his rent, and A. afterwards distrained without producing such receipt; it was held that A.'s right was postponed until after *his* rent had been paid, and that the defendant was liable as a trespasser (*d*). A subsisting tenancy is not determined by an agreement whereby the landlord lets to his tenant at a valuation to be made by two persons, and stipulates that the tenant is to give sureties to answer for the rent, if no valuation be made and no sureties given (*e*).

Acknowledgment of an antecedent tenancy.

An acknowledgment of an antecedent tenancy at a specified rent, with an agreement to go on on certain terms, is sufficient to authorize a distress (*f*). But a lessor who lets to an under-tenant cannot, after the term has expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays him under threat of distress, although the under-tenant still retain the possession (*g*). If the occupier of a house submits to a distress for rent stated in the notice of distress to be due from him as tenant to the distrainor, this is an acknowledgment of the tenancy (*h*).

Surrender.

If a tenancy has existed, a surrender of the term must be *complete*, or the landlord's right to distrain will con-

(*d*) *Giles* v. *Spencer*, 3 C. B. N. S. 244. See also Vin. Abr. "Releases," G.

(*e*) *John* v. *Jenkins*, 1 Cromp. & M. 227.

(*f*) *Eagleton* v. *Gutteridge*, 11 M. & W. 465; *Gladman* v. *Plumer*, 15 L. J. Q. B. 79.

(*g*) *Burne* v. *Richardson*, 4 Taunt. 720.

(*h*) *Panton* v. *Jones*, 3 Camp. 372. See *Cooper* v. *Blandy*, 3 L. J. C. P. 274.

tinue. So where a tenant, being in arrear of rent, agreed with his landlord to *deliver up the premises and to quit, and that a valuation should be made of his effects*, and in the meantime the premises were to be delivered to a trustee for the landlord, and the tenant's effects were not valued, nor did he relinquish possession; it was held that this did not constitute a surrender of the tenant's term, and that the right of the landlord to distrain for the arrears of rent continued for six months after the making of the agreement (*i*). A fire having occurred upon leasehold premises the lessor entered. Subsequently an accessory agreement was entered into between the parties for a new lease at an increased rent, as was evidenced by letters which passed between them, in one of which a suggestion was made that a memorandum should be indorsed upon the old lease referring to the increase of rent. This was not carried out, but payments of the increased rent were demanded and made, but under protest, by the lessee's solicitor. Upon the bankruptcy of the lessee the lessor distrained for rent at the increased rate. The County Court judge held that the old lease was still subsisting, and that consequently the old rental alone could be distrained for; but it was held on appeal, reversing that decision, that the old lease was surrendered by operation of law, and that the agreement for an increased rent having been made and acted upon, the distress for such increased rent was lawful (*j*).

Eviction.

If a tenant is evicted by title paramount, but remains in possession under a new agreement with the person who had evicted him, his original landlord cannot distrain on him for rent (*k*). And if a landlord treats an occupier of his land as a trespasser, by serving him with an ejectment, he cannot afterwards distrain upon him for rent, although the ejectment is directed against the claim of a third

(*i*) *Coupland* v. *Maynard*, 12 East, 134.

(*j*) *In re Vitale, Ex parte Young*, 47 L. T. N. S. 480.

(*k*) *Hopcraft* v. *Keys*, 9 Bing. 613.

Part I. Chap. III.

person who comes in and defends in lieu of an occupier, and the occupier is aware of that circumstance, and is never turned out of possession (*l*). And in an action of ejectment, where the landlord put a man into possession of one of ten houses, which was vacant by the former tenant's default in deserting it, and the man was merely put into possession for the purpose of security; it was held that the landlord could not distrain upon his goods (*m*). Again, where there was a lease for a yearly rent, payable quarterly, with a clause of re-entry in case the rent should be in arrear for twenty-one days, and three quarters' rent was due at Michaelmas, for which a distress was put in on the second of October, and on the second of November the landlord served a writ of ejectment, there being no sufficient distress upon the premises; it was held that the distress affirmed the continuance of the tenant's estate up to Michaelmas, and therefore that as a half-year's rent was not in arrear at the time of service of the writ, the landlord could not recover (*n*).

Notice to quit.

By the provisions of the statute 11 Geo. II. c. 19, s. 18, if a tenant gives notice to quit to his landlord, and does not deliver up possession at the appointed time, the landlord is entitled to recover by distress double the former rent for the whole time that the tenant holds the premises after the expiration of such notice.

Where a landlord has given a notice to quit, and the tenant holds over, but nothing is done to show that a new tenancy is created, the landlord cannot distrain for rent accruing due after the time when the notice expired (*o*). So a landlord has no right to distrain for double rent upon

Double rent.

(*l*) *Bridges* v. *Smyth*, 5 Bing. 410; *Jones* v. *Carter*, 15 M. & W. 718; *Franklin* v. *Carter*, 1 C. B. 750.

(*m*) *Wheeler* v. *Stevenson*, 6 H. & N. 155.

(*n*) *Cotesworth* v. *Spokes*, 10 C. B. N. S. 103.

(*o*) *Alford* v. *Vickery*, 1 C. & M. 280; *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Williams* v. *Stiven*, 9 Q. B. 14.

Weekly tenant holding over.

a weekly tenant who holds over after a notice to quit (*p*), but this has been doubted (*q*). And (in a case decided on the 11 Geo. II. c. 19, s. 18) where a tenant held under a demise for one year from the 25th of March then next ensuing, and so on from year to year, and having held for more than one year gave a parol notice to the landlord less than six months before the 26th of March that he would quit on that day, which notice the landlord accepted; it was held that the tenancy was not thereby determined, there not having been a sufficient notice to quit, or a surrender in writing. And, therefore, the tenant having holden over after the time mentioned in the notice to quit, the landlord was not entitled to distrain for double the rent under the 11 Geo. II. c. 19, s. 18, inasmuch as that statute applied to those cases only where the tenant had the power of determining his tenancy by a notice, and where he actually gave a valid notice sufficient to determine it (*r*).

Custom of the country.

Where it appeared that by the custom of the country the tenant was to leave his away-going crops in the barns, &c., of a farm for a certain time after the lease had expired, and the tenant having quitted the premises, the landlord distrained the corn so left for rent in arrear, six months having expired since the termination of the term; it was held that the landlord was entitled to distrain, as the holding by the tenant under the custom of the country was a prolongation of the original term (*s*).

Mistake

Where a landlord's receiver allowed a tenant every year for seventeen years to make a deduction in respect of a

(*p*) *Sullivan* v. *Bishop*, 2 C. & P. 359.

(*q*) See Bullen, 116, n. 5; Woodf. L. & T. 12th ed. p. 385, n. (*f*).

(*r*) *Johnstone* v. *Hudlestone*, 4 B. & C. 922. See *post*, pp. 177, 178.

(*s*) *Beavan* v. *Delahay and Lewis*, 1 H. Bl. 5; and *Lewis* v. *Harris*, in the note. See also *Knight* v. *Bennett*, 3 Bing. 361; *Nuttall* v. *Staunton*, 4 B. & C. 51.

payment for land-tax, greater than the landlord was liable to pay, and the landlord knew, or had the means of knowing, all the facts; it was held that he could not distrain for the amount erroneously allowed, although the receipt given every year showed the amount paid and the amount deducted (*t*).

(b) Reversioners.

It is also an established rule that a landlord cannot distrain for rent unless he has the reversion. As we have seen before, persons standing in the situation of landlords

At common law.

might, at the common law, have distrained for the rent reserved upon their leases, provided they had a future reversion in the land, whether immediately expectant on the determination of the term, or at a more distant period (*u*);

Assignment of reversion by landlord.

but if the landlord afterwards assigns his reversion, either absolutely or by way of mortgage, the remedy by distress for such arrears will be lost. Where a plaintiff mortgaged leaseholds to V., and V. assigned the mortgage to the defendants, the mortgage deed containing a clause "that the said V. may have the same powers of entry and distress as are by law given to landlords, and the plaintiff attorns hereby to the said V.," and the defendants, after the assignment, entered and seized for arrears of interest due *before* the assignment; it was held that the defendants could not justify such seizure under the above clause, which created a tenancy to give such rights of distress as would arise *under such tenancy*—*i. e.*, only so long as such tenancy continued—and that V., having conveyed his estate *before* the seizure, could not distrain (*x*).

Severance of the reversion.

The right to distrain may also be lost by the severance of the reversion. Thus, where the plaintiff was tenant

(*t*) *Bramston* v. *Robins*, 4 Bing. 11.

(*u*) *Ante*, p. 14; Bradby, 67; Co. Litt. 142 b.

(*x*) *Browne* v. *Metropolitan Counties Life Assurance Society*, 1 E. & E. 832; see also *Threr* v. *Barton*, Moore, 94; *Dixon* v. *Harrison*, Vaughan, 52; *Smith* v. *Torr*, 3 F. & F. 505; *In re Davis & Co., Ex parte Rawlings*, W. N. 1888, p. 236.

from year to year to six joint tenants, four of whom assigned their interest to a third party, subject to the plaintiff's interest, and at the time of this assignment the plaintiff owed 111*l.* for arrears of rent, and afterwards became tenant to the third party; it was held that, after such assignment to the third party, all right to distrain for the arrears of rent was gone (*y*).

Interesse termini.

But a second lease to commence on the expiration of the previous one creates only an "*interesse termini*" during the continuance of the first lease, and does not amount to an assignment of the reversion. Thus, where A. granted a lease to B. of premises for sixty-one years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the sixty-one years; it was held that, by the lease to C., A. did not part with his reversion so as to disentitle him to distrain for rent under the lease to B. (*z*).

Rents-seck.

As by the statute 4 Geo. II. c. 28, s. 5, all rents-seck are made distrainable (*a*), a reversion is no longer requisite for that which is a rent-seck within the meaning of that statute (*b*); and as it seems to have been a rule of the common law that a rent could not issue out of a mere chattel (*c*), it has been determined on this principle that even since the statute, if a lessee for years assign over his whole term reserving a rent, he cannot distrain for it when in arrear, because he has no reversion, but he may bring an action for the rent, although no reversion remains in him (*d*). Thus, where a lease came into the hands of

On assignment of the reversion.

(*y*) *Staveley* v. *Alcock*, 16 Q. B. 636; *Flesher* v. *Trotman*, 6 L. T. N. S. 218.

(*z*) *Smith* v. *Day*, 2 M. & W. 684; *Blackford*, app., *Cole*, resp., 5 C. B. N. S. 514; *Doe* v. *Walker*, 5 B. & C. 111.

(*a*) *Ante*, p. 20.

(*b*) *Ante*, p. 14.

(*c*) See *Butt's case*, 7 Rep. 23; *Lord Mountjoy's case*, 5 Rep. 4; *Earl of Stafford* v. *Buckley*, 2 Ves. Rep. 170; *Turner* v. *Turner*, 1 Bro. Ch. Rep. 316.

(*d*) *Newcomb* v. *Harvey*, Carth. 161; ——— v. *Cooper*, 2 Wils. 375; *Smith* v. *Maple-*

the original lessor by an agreement entered into between him and the assignee of the original lessee "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the goodwill already paid by such assignor;" it was held that such agreement operated as a surrender of the whole term, and the sum in the agreement was considered as a sum to be paid annually in gross, not as rent; and the assignee could not distrain either for that or for the original rent, but he had a remedy by action for the sum reserved for the goodwill (*e*). And, again, where the lessee of two farms agreed with A. that he should have them during the leases for the same (A. to remain tenant to the lessee during the leases), and at the leaving of the farms A. was to be paid for the fallows and dung, and A. took possession and paid one year's rent growing due after the date of the agreement to the lessee, who afterwards distrained for rent in arrear; it was held that the distress could not be supported, as the agreement operated as an absolute assignment of all the lessee's interest in the farms (*f*).

Where one partner assigned to his co-partner property held under sub-lease, and after purchasing the freehold sought to prove against his co-partner's estate for sums paid for rent, it was held that this right of proof was not defeated on the ground that his co-surety, on paying the rent, became entitled to a right of distress from the reversioners which he had destroyed by taking an assignment

back, 1 T. R. 441; *Poultney* v. *Holmes*, Stran. 405; *Hoby* v. *Roebuck*, 2 Marsh, 433; *Talentine* v. *Denton*, Cro. Jac. 111; Bradby, p. 68, note g; *Parmenter* v. *Webber*, 8 Taunt. 593; *Preece* v. *Corrie*, 5 Bing. 24; *Pascoe* v. *Pascoe*, 3 Bing. N. C. 898; Bullen, p. 54, and App. A.; *Pollock* v. *Stacey*, 5 Q. B. 1033; *Williams* v. *Haywood*, 1 E. & E. 1040; but see 44 & 45 Vict. c. 41, s. 44, *ante*, p. 14.

(*e*) *Smith* v. *Mapleback*, 1 T. R. 441; *Thorn* v. *Woollcombe*, 3 B. & Ad. 586.

(*f*) *Parmenter* v. *Webber*, 8 Taunt. 593.

of the leases, thereby discharging his co-surety's estate by releasing a remedy to the benefit of which his co-surety was entitled (*g*).

Underlease by lessee.

If a lessee underlet for a term shorter than his own by one day or more, he has a reversion, and consequently a right to distrain, which will pass to his executors (*h*). And a tenant from year to year who underlets from year to year has a reversion sufficient to enable him to distrain (*i*). But a lessor who lets to an under-tenant cannot, after the term has expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays him under threat of distress, although the under-tenant still retains the possession (*j*). If a termor surrenders his term to the reversioner, reserving to himself a rent, but without an express power of distress, he cannot distrain for the rent when in arrear, because he has no reversion.

Surrender.

4 Geo. 2, c. 28, s. 6.

But if a surrender be made, and a new lease granted, the right to distrain on previous under-tenants is preserved by the 4 Geo. II. c. 28, s. 6, which enabled a lessee to surrender his lease for the purpose of taking a new one, without a surrender of an underlease, and saved to the lessee all the same remedies against the underlessee, for rents, covenants, and duties, and to the original lessor the same remedies for rents and duties reserved in the former one out of which the under-lease was derived, as if the original lease were still kept on foot (*k*). And also by 8 & 9 Vict. c. 106, s. 9, which enacts that "if a reversion expectant on a lease is surrendered, the estate which confers, as against the

8 & 9 Vict. c. 106, s. 9.

(*g*) *Russell* v. *Shoolbred*, 29 Ch. Div. 254.

(*h*) *Wade* v. *Marsh*, Latch, 211; Bullen, 54.

(*i*) *Curtis* v. *Wheeler*, Moo. & M. 493; *Oxley* v. *James*, 13 M. & W. 209; Woodf. L. & T. 12th ed. 393.

(*j*) *Burne* v. *Richardson*, 4 Taunt. 720.

(*k*) Smith's L. & T. 317, 2nd ed.; *Doe* d. *Palk* v. *Marchetti*, 1 B. & Ad. 715. See *In re Vitale, Ex parte Young*, 47 L. T. N. S. 480.

Part I. Chap. III.

tenant, the next vested right to the tenements, shall be deemed the reversion for the purpose of preserving the incidents to and obligations on the reversion" (*l*).

Where A. took a lease in writing, in his own name, of premises, and subsequently occupied only part, and paid rent for so much as he occupied to B., as whose agent he in fact took the lease; it was held that B. might distrain for the part so occupied, and that A. was precluded in replevin from disputing his title (*m*).

By a deed of settlement certain premises were conveyed to trustees for 1,000 years by way of mortgage, and subject thereto lands were settled to R. for life, with a power of leasing. R. executed a lease, in which she reserved rent to "a person or persons who for the time being should be entitled to the freehold or inheritance of the demised premises immediately expectant on the death of the said R." It was held that the assignee of the trustees of the mortgage term was the "person entitled to the immediate reversion expectant on the death of R.," and although not entitled to the freehold or inheritance, was, notwithstanding the reservation contained in the lease, entitled to distrain on the tenant for rent in arrear. Denman, C. J., observing, "They (*i.e.* the trustees of the mortgage term) have not, as owners of the estate, the freehold or inheritance in the technical sense of those words; but if they are entitled to the rents as the owners of the immediate reversion in a portion of the inheritance, the reservation of rent is sufficient to give them a legal interest in it, and they may distrain for the rent; and as they have assigned their legal estate, the assignee may do the same" (*n*).

By the 14 & 15 Vict. c. 25, s. 1, a tenant, whose

(*l*) Smith's L. & T. 316, 2nd ed.; Woodfall's L. & T. 383, 10th ed.

(*m*) *Clarke* v. *Waterton*, 8 C. & P. 365.

(*n*) *Rogers* v. *Humphreys*, 4 Ad. & Ell. 299.

tenancy determines by the death or cesser of the landlord's estate, is entitled in lieu of emblements to continue to occupy until the end of the current year of the tenancy. It has been held that a "succeeding landlord" of a preceding deceased lessor, who is entitled by this section "to recover and receive" a proportion of rent from the tenant, is justified in obtaining such rent by distress as well as by action (*o*).

Having now treated generally of what is a sufficient reversion to support a distress, we will proceed to discuss more particularly the different classes of persons, who having this reversion, are enabled to distrain.

(c) Coparceners.

May join in making a distress.

Or one coparcener may distrain alone.

Consent of other coparceners not necessary.

In case of replevin.

After partition.

Coparceners before partition are considered in law as but one heir (*p*), and therefore they cannot have several distresses for rent held in coparcenary. They may either join in making a distress (*q*), or one coparcener may distrain alone for the whole rent, each having an estate in every part of it (*r*). No consent from the other coparceners need be previously obtained in order to authorize one coparcener to distrain alone, or alone to appoint a bailiff for the whole rent (*r*). In the event of a replevin, however, the avowry must be, according to the nature of the estate, joint; or the party distraining alone must avow in her own right for her own share, and make cognizance as bailiff of the other coparceners (*s*). But after partition they may make several distresses, and so may their grantees (*t*). And even a rent-charge, although in its nature entire, and against common right, may be divided

(*o*) *Haines* v. *Welch and Marriott*, L. R. 4 C. P. 91.

(*p*) Co. Litt. 163 b.

(*q*) *Steadman* v. *Page*, 5 Mod. 141; *Steadman* v. *Bates*, 1 Lord Raym. 64.

(*r*) *Leigh* v. *Shepherd*, 2 Brod. & B. 465; *Robinson* v. *Hoffman*, 4 Bing. 562; Bullen, 44.

(*s*) *Leigh* v. *Shepherd, supra;* Bullen, 44; Woodf. L. & T. 12th ed. 394; *Culley* v. *Spearman*, 2 H. Bl. 386.

(*t*) *Butler and Baker's case*, 3 Co. Rep. 22 b; Co. Litt. 164 b, 169 b; Bullen, 45.

between coparceners: and thus, by act of law, the tenant of the land may become subject to several distresses (*u*). But coparceners, after they have parted with their estate, cannot distrain for previous arrears (*x*). Where upon partition between coparceners, a rent issuing out of the lands descended (*y*), is assigned to one for equality of partition, such rent is distrainable of common right, whether in the hands of the coparcener, or of her grantee, for it is annexed to the estate (*z*).

Whatever rent accrues to coparceners as such, that is to say, whatever rent they are jointly entitled to in the course of coparcenary, partakes of the nature of their estate, and is subject to the same rules of distress (*a*). Thus, if there be three coparceners, and they make partition, and one of them grant twenty shillings per annum out of her part to her two sisters, and their heirs, for equality of partition, they shall have this rent in course of coparcenary, and shall join in an action for the same; and as this rent is entire in its creation, they must join in a distress (*b*). And if two coparceners by deed alien both their parts to another in fee, rendering to them and their heirs a rent out of the land, they are not joint tenants of this rent, but shall have it in coparcenary, because their right in the land out of which it was reserved was in coparcenary (*c*).

Tortious acts of coparceners.

One coparcener cannot be deprived of her rights by the tortious acts of another: and, therefore, if there be two coparceners of a seigniory, and one of them disseise the

(*u*) *Bradby*, 38; Bullen, 45; *Rivis* v. *Watson*, 5 M. & W. 255.

(*x*) *Dixon* v. *Harrison*, Vaughan, 52; *Staveley* v. *Alcock*, 16 Q. B. 636. See also *Flesher* v. *Trotman*, 6 L. T. N. S. 218.

(*y*) Litt. ss. 252, 253; Harg. note (1) on Co. Litt. 153 a; Co. Litt. 169.

(*z*) *Butler and Baker's case*, *supra*.

(*a*) Bullen, 45.

(*b*) Co. Litt. 169 b; *Stukeley* v. *Butler*, Hob. 172; Bradby, 38.

(*c*) Co. Litt. 169 b. See also *Leigh* v. *Shepherd*, *ante*, p. 45.

tenant of the land, the other copareener may distrain for her moiety (*d*). But if coparceners join together in an act, whereby they entirely part with their coparcenary estate (as by levying a fine of the rent, even to the use of themselves), their former estate is thereby so entirely destroyed that they cannot afterwards distrain for the arrears of rent accrued before the fine was levied (*e*).

Unity of seisin.

Where one coparcener has a unity of seisin or possession of a rent, and of the land on which it is charged, the law apportions the rent, extinguishing so much of it only as is proportionate to her share in the land. Thus, if a woman be seised of a rent-charge, and afterwards the land charged descend to her and her two sisters in coparcenary, only a third part of the rent is extinct by such unity of estate; but the coparcener who has the rent cannot distrain on the land for the other two parts of the rent until after partition, because until that time she is seised with her two sisters "*per my et per tout*" in the land (*f*).

(d) Co-heirs in gavelkind.

Co-heirs in gavelkind are parceners by custom, and are governed by the same rules with regard to the right of distress as parceners at common law (*g*).

One of several co-heirs in gavelkind may distrain for rent due to himself and his co-heirs without express authority from them. This was decided by the case of *Leigh* v. *Shepherd* (*h*), where Dallas, C. J., reviews the authorities on this subject, observing that "there is no difference in this respect between parceners at common law and co-heirs in gavelkind, the latter being only parceners by custom."

(e) Joint tenants.

Joint tenants, like coparceners, hold by one title, and by one right, and are seised "*per my et per tout*" of the

(*d*) Co. Litt. 148 b.

(*e*) *Dixon* v. *Harrison*, Vaughan, Rep. 52.

(*f*) Bro. Abr. Dist. pl. 38, 65, and exting. 31; Bradby, 39.

(*g*) Litt. ss. 241, 265.

(*h*) 2 Brod. & B. 465.

rent or land (*i*). And therefore, as each joint tenant has an estate in every part of the rent, he may distrain alone for the whole, although he must afterwards avow jointly with his companions, and account to them for their respective shares in the rent (*k*). And the survivor may distrain for the arrears accrued in the lifetime of his deceased companion (*l*).

A distress for rent may be authorized by one of several joint tenants (*m*). One joint tenant may also sign a distress warrant, and thereby appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if, when applied to, they merely decline to act, that will not prevent him from proceeding (*n*). Where A. was tenant from year to year to six joint tenants, four of whom assigned to F., subject to A.'s interest, and at the time of this assignment A. owed 111*l.* for arrears of rent, and afterwards became tenant to F.; it was held that after the assignment to F. all right to distrain for such arrears of rent was gone (*o*).

Severance of estate by joint tenants' act.

Tortious acts.

Joint tenants cannot in general by their own act divide their estate to the prejudice of others (*p*), nor can they, by a tortious act, destroy each other's rights; and therefore, as in the case of co-parceners, if two of them be seised of a seigniory, and one of them disseise the tenant of the land, the other may distrain for his moiety of the rent (*q*); for this is construed to be a temporary severance of the joint tenancy, and therefore a moiety only of the rent is suspended by the unity of possession (*r*). As in

(*i*) Litt. s. 288; Bradby, 39.

(*k*) *Pullen* v. *Palmer*, 3 Salk. 207.

(*l*) 2 Roll. Abr. 86; Bradby, 39.

(*m*) *Morgan* v. *Parry*, 17 C. B. 342, per Jervis, C. J.

(*n*) *Robinson* v. *Hoffman*, 4 Bing. 562; Bullen, 46; Woodfall's L. & T. 10th ed. 384.

(*o*) *Staveley* v. *Alcock*, 16 Q. B. 636.

(*p*) Vin. Abr. Apportionment, B. 17.

(*q*) Co. Litt. 148 b.

(*r*) Co. Litt. 188 a; Bradby, 40.

general joint tenants cannot destroy the rights which attach upon the land (*s*), so they cannot charge the land to the prejudice of each other's estate therein. And, therefore, if there be two joint tenants in fee, and one grant a rent-charge by deed to a stranger out of his part in the land, such rent-charge is effectual during the life of the grantor, but is void after his decease, and the survivor has the whole land discharged of the rent (*t*), because the survivor claims the land from the first feoffor, which is by a title paramount to the grant of the rent-charge. But if there be two joint tenants in fee, and one grant a rent-charge out of his part, after release to his joint tenant, and die, the survivor shall hold the land charged, because he claims under the release of his companion (*u*). Upon the same principle, if there be two joint tenants in fee, and one make a lease for years, reserving rent, and die, the surviving joint tenant will have the reversion by survivorship, but shall not have the rent, because he claims the land by a title paramount to the lease, namely, from the first feoffor, and therefore is a stranger to the rent (*x*).

Different modes of severance.

We may remark that joint tenants may sever the tenancy in several ways, as by the alienation of any freehold estate in the land, or by voluntary partition at common law, or by compulsory partition by statute (*y*). But a joint tenant cannot sever his estate by will. From the moment of severance the share which has been disposed of is at once discharged from the rights and incidents of joint tenancy, and becomes the subject of a tenancy in common (*z*).

Demise by joint tenant.

One joint tenant may demise his portion to his companions so as to create a right to distrain for the rent in

(*s*) But see *Lingen* v. *Payn*, Bridg. 129.
(*t*) Litt. s. 286; Bradby, 40.
(*u*) Co. Litt. 185 a; Bradby, 40.
(*x*) *Ibid.*
(*y*) 3 & 4 Will. 4, c. 27; 31 & 32 Vict. c. 40, amended by 39 & 40 Vict. c. 17, ss. 3, 4, 5.
(*z*) Wms. R. P. 12th ed. 136.

arrear. So, where two co-executors demised to the other executor, and gave exclusive possession of the property demised, and distrained for the rent in arrear, the executor taking possession from the other co-executors on such terms, was estopped from denying their right to distrain (*a*).

(f) Tenants in common.

May distrain severally.

Tenants in common do not, like joint tenants, hold by one title and one right; they have a distinct and several title to their shares. They are therefore entitled to distrain severally, each for his respective share of the rent; but one alone cannot distrain for more than his own share (*b*). Supposing the shares of all to be in arrear, there seems to be no objection to their joining in a distress for the whole;

In replevin.

but in all cases, in the event of a replevin, they are obliged to sever and avow according to their estates separately (*c*). Thus, if three tenants in common distrain thirty beasts, one must avow for ten, the other for ten, and the third for ten more (*d*). And where land was demised by four persons (whose original title did not appear) at one entire rent, to be divided and paid separately in equal portions; it was held that a distress by one of the four for her own share was regular, for whatever might have been the interest of the lessors, as between themselves, they were certainly tenants in common, as between them and their lessee, and each was entitled to a separate distress (*e*).

Tenants in common are severally entitled to receive their several proportions of the rent; and, therefore, a person holding under two tenants in common cannot pay the whole rent to one after notice from the other not to pay it; and, if he does, the other tenant in common may distrain for his share (*f*). As tenants in common have no original

(*a*) *Cowper* v. *Fletcher*, 6 B. & S. 464.

(*b*) *Pullen* v. *Palmer*, 3 Salk. 207; Bradby, 41.

(*c*) Litt. s. 317; Bullen, 48.

(*d*) *Pullen* v. *Palmer*, *supra*.

(*e*) *Whitley* v. *Roberts*, M'Clel. & Y. 107.

(*f*) *Harrison* v. *Barnby*, 5 T. R. 246; and see *Doe* v. *Mitchell*, 1 Brod. & B. 11; *Powis* v. *Smith*, 5 B. & Ald. 850; Bradby, 49.

privity of estate between them as to their respective shares, one may lease his part of the land to the other, rendering rent, for which a distress may be made, as if the land had been demised to a stranger (*g*).

Leases between tenants in common.

A rent-charge may be divided by will, or by deed operating under the Statute of Uses (*h*), so as to make the tenant liable without attornment to several distresses by the devisees or *cestuis que use* (*i*); and where a tenant in common demises his share to his co-tenant he may distrain for the rent reserved upon the goods and chattels of such co-tenant (*k*).

Allotments under the Inclosure Acts.

By the statute 1 & 2 Geo. IV. c. 23, s. 1, it is provided that "it shall be lawful for persons to whom any allotments of land have been set out or allowed under any Inclosure Acts, and to whom possession of such allotments has been given, and who have demised the same, or any part thereof, or for their bailiffs or agents, or any persons by them authorized or employed for that purpose, to enter into and upon such allotments, and *seize and distrain* any goods, chattels, or effects, &c., for rent in arrear and unpaid, notwithstanding the Commissioners' award shall not have been executed and perfected."

(g) Tenant in fee simple.

A person may be tenant in fee simple of a rent-service, or fee-farm rent, created *prior* to the statute of Quia Emptores (*l*), and may distrain for it of common right as such; but a rent-service cannot now be reserved by a tenant in fee of land on the alienation of his whole estate, except by the Crown (*m*). A grant in fee reserving a perpetual rent, with an express power of distress, would, however, be good

(*g*) Bro. Abr. Dist. pl. 65; *Hudson* v. *Snelgar*, 2 Roll. Rep. 212; *Snelgar* v. *Henston*, Cro. Jac. 611.

(*h*) 27 Hen. 8, c. 10.

(*i*) *Rivis* v. *Watson*, 5 M. & W. 255.

(*k*) *Brennan* v. *Hood*, 4 Ir. C. L. R. Q. B. 332.

(*l*) 18 Edw. 1, c. 1.

(*m*) Bullen, 49.

as a rent-charge (*n*). And if such a rent were created at the present day without a power of distress, it would be a rent-seck, and as such attended with the right of distress under 4 Geo. II. c. 28 (*o*).

(h) Tenant in tail.

A rent-service may be reserved, or a rent-charge granted in fee tail, and in either case the tenant in tail of the rent is entitled to recover it by distress; in the former case of common right, and in the latter by virtue of the clause in the deed (*p*). Although a tenant in tail makes leases not conformable to any of the Acts enabling him to do so (*q*), such leases are good as against himself, and therefore, as a reversioner, he may distrain, even at common law, for the rent reserved thereby (*r*).

(i) Tenants for life.

On the conveyance of a life estate out of an estate in fee, a rent-service for life may be reserved, and will be distrainable as such at common law in respect of the reversion. In like manner a rent-charge distrainable by force of the clause in the deed, may be limited to a person for his own life, or for that of any other person, or for any number of lives. In such cases the grantee of the rent-charge will be tenant for life, or tenant *pur autre vie* of such rent (*s*). Tenants for their own lives, or *pur autre vie*, or tenants in tail after possibility of issue extinct, have estates of freehold; and therefore if they make a lease for years, or for the lives of others, reserving rent, they are entitled at the common law to distrain upon their lessee in respect of the reversion, which in contemplation

(*n*) Co. Litt. 143 b, note 5; and judgment of Buller, J., in *Bradbury* v. *Wright*, 2 Dougl. 624.

(*o*) Sm. L. & T. 3rd ed. 121, note (*y*), and p. 122. See also 1 Selw. N. P. 13th ed. 558, note (*i*); and *Vigers* v. *Dean of St. Paul's*, 14 Q. B. 909.

(*p*) Bullen, 49.

(*q*) 3 & 4 Will. 4, c. 74; 19 & 20 Vict. c. 120, s. 35, which repealed 32 Hen. 8, c. 28; 40 & 41 Vict. c. 18; and 45 & 46 Vict. c. 38, s. 58, sub-s. 1 (i) and (vii).

(*r*) *Ex parte Smyth*, 1 Swanst. 346, note; Bradby, 48.

(*s*) Bullen, 50.

of law belongs to their respective estates. But if they make a grant which amounts to a disposition of their whole estate, reserving rent, they cannot of course distrain at common law for want of a reversion, unless a power of distress be especially reserved. But by the statute 4 Geo. II. c. 28, such rent is now distrainable as a rent-seek (*t*). By statute 32 Hen. VIII. c. 37, s. 4, tenants *pur autre vie* may distrain for arrears due at the death of the *cestui que vie*, in the same manner as they might have done at common law during his life (*u*).

4 Geo. 2, c. 28.

32 Hen. 8, c. 37, s. 4.

And by the statute 8 Anne, c. 14, s. 6, it is enacted that "it shall and may be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined. Provided (*v*) that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant, from whom such arrears became due" (*x*).

8 Anne, c. 14, s. 6.

Death of lessee before expiration of term.

Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder of the term, and after the expiration of it, a distress may be taken for rent due for the whole term (*y*). A distress may be made after the expiration of the six months mentioned in the above statute, during the time that the tenant, according to the custom of the country, has the way-growing crop on the premises (*z*).

(*t*) Bradby, 49. See *Langford* v. *Selmes*, 3 Kay & J. 220.

(*u*) Cruise, Dig. by White, tit. "Rents," ch. ii. s. 10.

(*v*) Sect. 7.

(*x*) See sect. 4 of Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21).

(*y*) *Braithwaite* v. *Cooksey*, 1 H. Bl. 465; *Nuttall* v. *Staunton*, 4 B. & C. 51; *Gray* v. *Stait*, L. R. 11 Q. B. D. 668.

(*z*) *Beavan* v. *Delahay*, 1 H.

Part I. Chap. III.

(j) Tenants by the curtesy.

A husband may be tenant by the curtesy of a rent-service where he is entitled as tenant by the curtesy to the reversion of the land out of which it issues, and he may distrain for such rent-service of common right. But a husband, unless he be tenant by the curtesy, cannot distrain for rent which becomes due after the death of his wife under leases of her freehold made by both of them, or by him on her behalf (*a*).

(k) Tenants in dower and freebench.

A woman may be endowed of a rent as well as of land, whether it be rent-service, rent-charge or rent-seck, and her right to distrain will follow the nature of the rent (*b*); but not of an annuity, because that only charges the person, and is not issuing out of lands and tenements (*c*). A widow, to whom dower has been assigned by metes and bounds, may distrain for the subsequent part of that rent (*d*). If a rent be assigned to a widow instead of her dower, she may distrain for it, although she has no reversion, and the rent was granted without deed; for, as we have seen, such rent is in its nature distrainable of common right (*e*).

Lands taken in lieu of dower.

A tenant in dower is entitled to hold lands of the husband taken by her from the heir, in exchange for her dower, and may distrain on such lands of common right (*f*).

A widow is entitled to a rent as her freebench by custom out of copyhold tenure. Where a copyholder in fee (there

Bl. 5; *Lewis* v. *Harris*, note at p. 7 in above case; *Neave* v. *Moss*, 1 Bing. 360.

(*a*) *Howe* v. *Scarrott*, 4 H. & N. 723. See also *Hill* v. *Saunders*, 2 Bing. 112; Bullen, 51.

(*b*) Co. Litt. 32 a.

(*c*) Co. Litt. 144 b; Bradby, 47.

(*d*) Co. Litt 29 a, 34 b, 144 b; *Stoughton* v. *Leigh*, 1 Taunt. 410; Bradby, 47.

(*e*) Co. Litt. 34 b, 169 b; Bullen, 52.

(*f*) Co. Litt. 34 b; Bradby, 48. As to the period when a tenant in dower becomes entitled to distrain for rent of which she is endowed or dowable, see Bullen, pp. 52, 53.

being a custom for a widow's estate) made a lease by licence, reserving rent to himself and his wife during their lives, and to his heirs, it was decided that the wife should have the rent, after her husband's death, with a power of distress as for other copyhold rents (*g*).

(l) Tenants under execution.

Tenants by elegit, or by statutes merchant, or staple, have so far an estate in the rent of land taken in execution as to be able to distrain; although from the nature of their estate they can only have an uncertain interest in the reversion (*h*). In the case of a rent-charge, the clause of distress attached to the grant or reservation follows the rent into whatever hands the rent itself passes; and in the case of a rent-service, such tenant is entitled for the time being to the immediate reversion.

In case of rent-charge.

In case of rent-service.

Tenants by elegit.

A tenant by elegit is not within the statute 32 Hen. VIII. c. 37, which gives a right of distress to tenants *pur autre vie* after the death of the *cestui que vie*. And therefore where there was judgment against the tenant for life of a rent-charge, and a moiety of the rent was taken in execution under an elegit, and more rent being in arrear, the tenant for life died; it was held that the tenant by elegit could not distrain for the arrears accrued before the tenant for life's decease, he not being named in the statute, nor coming in under the party, but by act of law (*i*). But it seems that a tenant by elegit does come within the terms of the statute 4 Anne, c. 16, s. 9, and that consequently he has a right to distrain without attornment (*k*).

(*g*) *Sacheverell* v. *Frograte*, 1 Vent. 163; *Laugher* v. *Humphrey*, Cro. Eliz. 524; Com. Dig. "Rent" B. 5.

(*h*) Bro. Dist. pl. 72; *Pool* v. *Neel*, 2 Sid. 29; *Dighton* v. *Greenvill*, 2 Vent. 327; *Corbett's case*, 4 Rep. 82.

(*i*) *Pool* v. *Neel*, 2 Sid. 28; Bradby, 50.

(*k*) *Lloyd* v. *Davies*, 2 Exch. 103; *Sir Thomas Campbell's case*, Roll. Abr. tit. Execution (B); *Bishop of Bristol's case*, 3 Leon. 113.

Part I. Chap. III.

(m) Heirs.

The right of distress follows the nature of the estate in the land or in the rent, whether an heir be the heir of a tenant in fee simple or fee tail, or whether he take by descent at common law, or by custom; so that it is always necessary, in order to determine when an heir shall have a rent, and a power of distress for its recovery, to consider the terms of the grant or reservation under which he claims and the nature of the ancestor's estate either in the rent or in the reversion of the land out of which it is reserved (*l*). Whenever on a grant of lands of which the grantor is seised of an estate of inheritance, a rent-service is properly reserved specifically or generally *during the term*, all the rent which becomes due, even an hour after the ancestor's death, goes with the reversion to the heir, and this applies to rent-charges and rents-seck (*m*). If the rent be not specifically reserved, the law will distribute it according to the estate. And if the reservation is bad, the law in general will not suffer it to destroy the rent, but carry it along with the estate to him to whom the reservation should have been made (*n*).

Nomine pœnæ.

When the heir is entitled to a rent, he is also entitled to all its incidents, and therefore a "*nomine pœnæ*" (or penalty to oblige the tenant to pay the rent punctually) will descend to him (*o*). But arrears of rent accruing in

(*l*) Bullen, 59. As to reservations of rent-service and the construction of such reservations, see *Cother* v. *Merrick*, Hard. 91; *Stafford's case*, Dyer, 252; *Oates* v. *Frith*, Hob. 130; *Randall* v. *Jenkins*, 1 Mod. 110; *Sacheverell* v. *Frograte*, 2 Saund. 367, and notes. See also Com. Dig. tit. Rent (B), 5.

(*m*) Bullen, 58.

(*n*) *Darrell* v. *Wilson*, Cro. Eliz. 644; Co. Litt. 214 a; *Oates* v. *Frith*, *supra*; *Cother* v. *Merrick*, *supra*; *Bland* v. *Inman*, Cro. Car. 288; *Richmond* v. *Butcher*, Cro. Eliz. 217; Co. Litt. 148 a. n. (1); *Stafford's case*, Dyer, 253; see also *Pilkinton* v. *Dalton*, Cro. Eliz. 575; *Clun's case*, 10 Co. Rep. 127 (a); Anon. 2; Shower, 77.

(*o*) Co. Litt. 162 b; Gilb. Rents, 144; *Bendloss* v. *Phillips*, Cro. Eliz. 895; Bradby, 59.

the life of the ancestor belong to the personal representatives of the ancestor, and not to the heir.

(n) Executors and administrators.

A rent-charge, not of inheritance, and all chattels real, will go on the testator's or intestate's death to the executor or administrator, together with the remedy of distress for the recovery of all rent accruing after such death (*p*). Where a lessee for fifty years underlets for twenty years, reserving rent, and dies during the latter term, the rent and reversion will vest in his personal representatives, who may then distrain at common law for the arrears of rent that became due in the lifetime of the deceased (*q*).

At common law neither the heirs nor the personal representatives of tenants in fee, fee tail, or for life, of a rent-service, rent-seek, or fee-farm rent, could distrain for arrears incurred in the lifetime of the owners of such rents (*r*).

32 Hen. 8, c. 37, s. 1.

But by 32 Hen. VIII. c. 37, s. 1, "the executors and administrators of every such person to whom any such rent or fee farm shall be due, and not paid at the time of their deaths, may distrain upon the lands chargeable with the payment thereof, in like manner as the testator himself might have done in his lifetime, so long as the lands remain in the possession of the tenant, who ought to have paid the rent, or fee farm, or of any other person claiming by and from him by purchase, gift, or descent." Section 4 of the same statute (*s*) enables executors and administrators of tenants *pur autre vie*, as well as such tenants themselves, to distrain for the arrears due at the death of the *cestui que vie*, upon the lands and tenements out of which rents or fee farms issue, in the same manner as the tenants *pur*

(*p*) Bullen, 60, 61; *Druce* v. *Bailey*, 1 Vent. 275; *Sacheverell* v. *Frogate*, 2 Saund. 371, note 7.

(*q*) *Wade* v. *Marsh*, 1 Roll. Abr. 672, tit. Distress (O), 13; Bradby, 56.

(*r*) Co. Litt. 162 a.

(*s*) 32 Hen. 8, c. 37; see also 8 Anne, c. 14, ss. 6, 7.

Part I. Chap. III.

autre vie might have done during the life of the *cestui que vie*.

To what the statute extends.

This statute has been considered a remedial law, and has been decided to extend to the executors and administrators of all tenants for life, as well tenants for their own lives as tenants *pur autre vie* (*t*). But the executors and administrators of persons entitled to rent-charges for terms of years are not within this statute, for they are not tenants in fee, fee tail, or for life of such rents (*u*); and it was formerly held that, if a person seised in fee demised land for years, reserving rent, such rent was not within the statute, and his executors or administrators could not distrain after his death for arrears of rent incurred in his lifetime (*x*).

3 & 4 Will. 4, c. 42, s. 37.

But now, by the 3 & 4 Will. IV. c. 42, s. 37, it is enacted that "the executors or administrators of *any* lessor or landlord may distrain upon the lands demised, *for any term, or at will*, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime"; and by sect. 38 (*y*), "such arrears may be distrained for after the end or determination of such term or lease at will, in the same manner as if such lease had not been ended or determined; provided that such distress be made within six months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and also provided that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made." In all cases, therefore, where the testator or intestate was seised of a rent of *any kind*, either in fee simple, fee tail, or for life, his executors

(*t*) *Hood* v. *Bell*, 1 Lord Raym. 172; Co. Litt. 162 a, 162 b; Harg. notes, 298, 299; Bradby, 51.

(*u*) *Turner* v. *Lee*, Cro. Car. 471.

(*x*) *Prescott* v. *Boucher*, 3 B. & Ad. 849; *Jones* v. *Jones*, 3 B. & Ad. 967.

(*y*) 3 & 4 Will. 4, c. 42.

or administrators may distrain for the arrears incurred in his lifetime under the operation of the statute 32 Hen. VIII. c. 37; and for all arrears of rent-*service* incurred in his lifetime on a lease for years, or at will, they may distrain under the statute 3 & 4 Will. IV. c. 42 (*z*).

These provisions apply only to cases where the owner of the rent, if he had lived, might have distrained himself; and, therefore, if the rent be in arrear, and the owner grant away his interest, and die, his executors or administrators have no right of distress for those arrears (*a*).

By the words of the statute 32 Hen. VIII. c. 37, the distress must be made whilst in the possession of the "tenant in demesne," or some person claiming under him by purchase, gift, or descent; and, therefore, it extends to the possession of those persons only who claim under the tenant, and does not comprise the lord claiming by escheat, tenant in dower, or by the curtesy; for they come in not under the party but by act of law (*b*).

And in case of a rent-charge, it has been decided that if a tenant in tail grants a rent for life and dies, the executors of the grantee cannot distrain for any arrears upon the issue in tail, *because* the issue in tail comes in under the original gift in tail, and consequently by title paramount to the tenant in demesne (*c*).

The cases as to the question on whose possession executors and administrators may distrain for arrears, do not apply to estates *pur autre vie*. So that if a man grant a rent-charge to A. for the life of B., and make a lease to C. for life, remainder to D. in fee, and the rent be in arrear, and then B. dies, and afterwards C. dies also; A., or his

(*z*) Bullen, 64.

(*a*) Co. Litt. 162 b; *Ognel's case*, 4 Co. Rep. 50 b; *Dixon* v. *Harrison*, Vaughan, 40.

(*b*) Co. Litt. 162 b; 1 Leon. 307; for other cases decided on this statute, see Bullen, 65, 66.

(*c*) *Lord Fairfax* v. *Lord Derby*, 2 Vern. 612; *Lambert* v. *Austin*, Cro. Eliz. 333.

executors or administrators, may distrain upon D. in remainder for all the arrears (*d*).

All arrears of rent are within the statute.

But not corporal services.

All arrears of rent issuing out of a freehold or inheritance, whether in money, corn, or any other profit, and whether annual, or every two, three, or four years, are within the statute; but corporal services are not, nor arrears of a rent by way of "*nomine pœnæ*" (*e*), nor rent issuing out of copyholds (*f*).

Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it, a distress may be taken for rent due for the whole term (*g*), not exceeding six years (*h*): but it is otherwise where a mere tenant at will dies, and his widow continues in possession (*i*).

Where two executors demise to the other, giving exclusive possession of the property demised, and then distrain for the rent in arrear, the co-executor taking from the other executors on such terms is estopped from denying their right to distrain (*k*).

Bailiff's authority to distrain after death of testator.

A bailiff who has received authority from his testator to distrain, but has not in fact distrained until after the death of the testator, may make cognizance as bailiff of the executor under 32 Hen. VIII. c. 37, s. 1, if the latter has ratified the distress after probate, although the distress was made before probate (*l*).

Rights of executors and administrators *inter se*.

Where there are several executors or administrators, they may either all join in distraining, or any one of them may distrain alone for the whole rent due; for they are all

(*d*) Bullen, 66.
(*e*) Co. Litt. 162 b.
(*f*) Bullen, 67.
(*g*) *Braithwaite* v. *Cooksey*, 1 H. Black. 465.
(*h*) 3 & 4 Will. 4, c. 42, s. 42.
(*i*) *Turner* v. *Barnes*, 2 B. & S. 435.
(*k*) *Cowper* v. *Fletcher*, 6 B. & S. 464.
(*l*) *Whitehead* v. *Taylor*, 10 Ad. & Ell. 210.

regarded in the light of an individual person (*m*). They have a joint and entire authority and interest in the effects of the testator or intestate, which is incapable of being divided; and in the case of death such authority and interest will vest in the survivor (*n*).

Time when executor may distrain.

An executor may distrain at any time after the death of the testator even before probate. But where a landlord entitled to the reversion of a term of years died without appointing an executor, a distress for rent made after his death, and before any grant of administration, was held unjustifiable (*o*).

Time when administrator may distrain.

On the other hand, an administrator has no title until the letters of administration have been granted; and the property of the deceased vests in him only from the time of such grant (*p*). The grant of administration, however, has the effect of vesting leasehold property in the administrator by relation, so as to enable him to distrain afterwards for rent previously accrued (*q*).

(o) Devisees and legatees.

A rent-service may be devised or bequeathed; as may also a rent-charge.

By a devise of a freehold reversion in lands, or by a bequest of a reversion of a chattel real, expectant on a particular estate, during which a rent-service had been reserved, the rent will pass as incident to the reversion; and the devisees and legatees are entitled to distrain in respect of their reversionary estate or interest (*r*).

Even at common law before the Statute of Wills (*s*), devisees by custom might distrain for rent without the necessity of the tenant's attornment, because the will of

(*m*) 3 Bac. Abr. 30, tit. Executors (D), 1.

(*n*) Dyer, 23 b; Com. Dig. Administration (B), 12; Bullen, 67.

(*o*) *Keane* v. *Dee*, 1 Alcock & Napier, 496, n. (Irish).

(*p*) *Woolley* v. *Clark*, 5 B. & Ald. 745, 746.

(*q*) *Rex* v. *Horsley*, 8 East, 410.

(*r*) *Sacheverell* v. *Frogate*, 1 Vent. 164 a.

(*s*) 32 Hen. 8, c. 1.

Part I. Chap. III.

Devise or bequest of rent-service.

the testator might otherwise have been defeated (*t*). Where a rent-service is devised or bequeathed without mention of the land, the land itself will pass, unless a contrary intention appears (*u*); and it will continue a rent-service and distrainable as such in the hands of the devisee or legatee (*x*). Where a rent-service is devised alone, expressly, without any estate in the land, it was formerly necessary for the devisor to give a power of distress in order to entitle the devisee to distrain (*y*), but this will now be a rent-seck, and therefore distrainable in the hands of the devisee under the statute 4 Geo. II. c. 28, s. 5.

A rent-service reserved on an underlease of a chattel real, and bequeathed apart from any interest in the land, is, however, a mere personal annuity (*z*).

In all cases where there is a unity of possession in the rent and the land out of which it issues, it becomes a question, whether by means of it the rent is extinguished, or only suspended. And in the bequest of a chattel this question may arise, not only with respect to a unity of possession in the testator, but even in his executor. So where a man by his will bequeathed to his wife a term of years, so long as she should remain unmarried, and after her marriage a rent payable out of the same lands, and he made her his executrix; it was held that, although the whole term vested in her as executrix, this did not extinguish the rent by unity of possession (*a*).

It may be remarked that a devise vests absolutely by the testator's will, and the devisee becomes immediately entitled to distrain for any rent subsequently accruing; whereas, in the case of a legacy, the interest of the legatee must await the executor's assent to the bequest; for until

(*t*) Litt. ss. 585, 586.

(*u*) *Kerry* v. *Derrick*, Cro. Jac. 104; *Maundy* v. *Maundy*, 2 Stra. 1020; *Allan* v. *Backhouse*, 2 Ves. & Beam. 74.

(*x*) Bullen, 69.

(*y*) *Gouge* v. *Hayward*, Bridgm. 54.

(*z*) Bullen, 69.

(*a*) *Gouge* v. *Hayward*, *supra*; 1 Roll. Abr. 610.

such assent, the interest remains in the executor, and the legatee cannot distrain (*b*).

(p) Trustees.

Trustees, and persons who have vested in them the legal estates in trust for others, as the trustees of a bankrupt, including trustees making leases under special powers, or by virtue of any Act of Parliament, may distrain for rent in respect of such estates in the same manner as if they were themselves beneficially interested therein (*c*).

(q) Lords of manors and commoners.

A lord of a manor may of common right distrain in respect of his seigniory, and also in respect of his copyhold rents; for, as we have observed before, such a rent is in its very nature rent-service (*d*). The lands are chargeable in the hands of anyone claiming under the copyhold tenant; but not of a new tenant admitted to the copyhold for arrears due from his predecessors (*e*).

If the lord part with his manor, all privity of estate between him and the copyhold tenants is destroyed, and therefore he cannot distrain for arrears of rent previously incurred (*f*).

Copyhold rents are not within the statute 32 Hen. VIII. c. 37, which gives a remedy by distress for arrears of rent to executors and administrators (*g*). They are, however, within the statute 4 Geo. II. c. 28, s. 5 (*h*).

Right to distrain by reason of escheat.

A lord of a manor may also become entitled to distrain by reason of escheat; therefore, if a tenant lease for life, rendering rent to himself and his heirs, and dies without

(*b*) Bradby, 60.

(*c*) Bullen, 71. Where one of the trustees disclaimed by deed, such disclaimer was held sufficient to vest a complete title in the other trustees, so as to enable them to support a distress for rent on the premises devised; *Begbie* v. *Crook*, 4 L. J. C. P. 264; *Townson* v. *Tickell*, 3 B. & A. 31.

(*d*) *Laugher* v. *Humphrey*, Cro. Eliz. 524.

(*e*) 2 Watk. on Cop. 180.

(*f*) 2 Watk. on Cop. 180, 181, 182.

(*g*) *Appleton* v. *Doily*, Yelv. 135; *Sands* v. *Hempston*, 2 Leon. 142; Bullen, 58.

(*h*) Bullen, 58.

heirs, so that the reversion escheats to the lord, and afterwards the rent is in arrear, the lord may distrain; for the rent is incident to the reversion, and goes with the reversion into the hands of the lord (*i*).

Commoners' right to distrain *inter se*.

Where two commoners agree to their mutual advantage not to exercise their respective rights for a certain term; it was held that one might distrain the other's cattle damage feasant during that time (*k*).

In case of an absolutely stinted common in point of number, one commoner may distrain the supernumerary cattle of another; but not if an admeasurement be necessary, or where the stint has relation to the quantity of common land; and a commoner cannot distrain where the

Colour of right.

owner of cattle has any colour of right to put them on the land, as that would be taking to himself jurisdiction as to the competency of such right: but if there be no pretence or shadow of right, as in the case of a stranger's cattle, the commoner may always resort to distress. This was decided by the case of *Hall* v. *Harding* (*l*), which held that any colour of right in the owner of sheep trespassing upon a common was a good ground for replevin. In this case Lord Mansfield observes (*m*): "Where the lord, or the other commoners, have a colour of right, the question whether he has exceeded that right must be determined by an indifferent and competent jurisdiction, and not by the commoner himself. Tho commoner cannot therefore lawfully distrain, for that would be making himself his own judge in a matter that was uncertain in itself, and taking an immediate execution on his own judgment. The levancy and couchancy—where that is the measure of the commoners' right—must be tried and determined by a jury; and in the present case, where the number of cattle

(*i*) Litt. s. 348; Co. Litt. 215 b; Bullen, 57.

(*k*) *Whiteman* v. *King*, 2 H. Black. 4.

(*l*) 1 W. Black. 673, upholding *Dixon* v. *James*, 2 Lutw. 1241.

(*m*) At p. 2432.

to be put on depends upon the number of the commoners' acres, the same jurisdiction must decide between them 'what number of acres the commoner is really possessed of.' It is in effect the same object of inquiry as levancy and couchancy; and it is now established that where the right of common is for cattle levant and couchant, one commoner cannot distrain the cattle of another for a supposed overcharge" (*n*).

A claim of a custom from time immemorial that cattle upon adjoining commons strayed upon one to the other, is a sufficient colour of right to deprive a commoner of one common of the remedy of distress against trespassing cattle of a commoner of the adjoining commons, even though the latter has surcharged his own common (*o*).

A private Act of Parliament for the inclosure of a common, and an award by the commissioner under that Act, that all rights of common shall be extinguished, does not render the cattle of commoners "*pur cause de vicinage*," liable to be distrained damage feasant, unless the *locus in quo* has been completely fenced, or such commoners have had express notice of the extinguishment (*p*).

Suspension and extinction of a right of common.

A right of common appurtenant for cattle levant and couchant, proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, but then, and for more than thirty years past, turned to different purposes, was held not to be extinguished or suspended by reason of such change in the condition of the tenement, if the tenement was still in such

(*n*) Levancy and couchancy is a mere measure of the number of cattle or other animals that may be put upon a common: it does not necessarily indicate appurtenancy, *i. e.* refer to cattle actually fed upon the particular land—per Willes and Keating, JJ., in *Johnson* v. *Barnes*, L. R. 7 C. P. 592.

(*o*) *Cape* v. *Scott*, L. R. 9 Q. B. 269.

(*p*) *Wells* v. *Pearcy*, 4 L. J. C. P. 144.

a state that it might easily be turned to the purpose of feeding cattle (*q*).

By the 11 Geo. II. c. 19, s. 8, a landlord may distrain cattle of the tenants depasturing upon any common or way appertaining to the premises demised.

Mortgagors and mortgagees.

As the subject of distress by mortgagor and mortgagee is extensive, we have thought it better to treat upon it in a separate chapter (*r*).

(r) Annuitants.

A mere annuity cannot in general be distrained for (*s*), as it is a yearly payment of a certain sum of money granted to another, and charged only on the *person* of the grantor; in which respect it is distinguishable from a rent-charge, which is a rent imposed upon, and issuing out of land. But it may be distrained for where the deed creating it expressly confers a power to distrain (*t*).

Distinction between an annuity and a rent-charge.

If an annuity be granted out of an estate, and the grantor, to secure the payment, vests the estate in trustees for a term, to the use of the annuitant, and subject thereto continues in possession, the annuitant may distrain for the arrears; for supposing the term to have given him the reversion, the grantor is to be considered as his under-tenant, upon whom he might, as reversioner, distrain at common law (*u*). Where a testator granted an annuity or rent of 30*l.* to the defendant, with a power of entry and distress if the payment remained behind a certain time, payable in the first instance out of certain leasehold property then in his possession, and, if the leasehold proved inadequate, his freehold premises were rendered liable to the payment with the same powers, &c., and the defendant distrained in the first place on the freehold premises; it was held that the plaintiff was bound to give evidence of

(*q*) *Carr* v. *Lambert*, L. R. 1 Ex. 168.
(*r*) *Post*, Chap. IV.
(*s*) Co. Litt. 32 a, 144 b.
(*t*) *Chapman* v. *Beecham*, 3 Q. B. 723.
(*u*) *Fairfax* v. *Gray*, 2 W. Black. 1326.

the possession of the leaseholds at the time of his death, and not merely at the time of making his will (*x*).

In an action of replevin the defendant made cognizance for arrears of an annuity under a power of distress in an annuity deed. The plaintiff pleaded in bar a prior grant of an annuity, containing for a money consideration a grant, bargain, sale, and demise of the premises for a term unexpired, for securing the payment of the annuity, but did not allege *entry* or *election*, or that he was in under the grantee; it was held that the term of years so set up in the plea was no answer to the cognizance under the subsequent annuity deed, and without an entry was no bar to the distress (*y*).

A testator gave an annuity to his son T., and his realty and personalty to J. absolutely, subject to this annuity and other expenses. T. filed a bill and moved for a receiver, and it was held that T. had a power of distress, and his remedy was at law (*z*). Where an annuity was charged upon land after the death of the annuitant, and a proportionate part was to be paid to her legal representative, and after the death of the annuitant, 10*l.*, the amount which was due, was paid to her husband, who took out no letters of administration to her, and on his death *his* executor took out letters of administration to the annuitant; it was held that as he was the only legal representative of the annuitant he was entitled to distrain upon the lands for the proportion of the annuity due at the annuitant's decease, and the payment of the 10*l.* to the husband could not be taken into account (*a*).

(*x*) *James* v. *Salter*, 3 Bing. N. C. 505. For the period in which a distress for arrears of an annuity must be made, see *post*, p. 180.

(*y*) *Miller* v. *Green*, 2 Cromp. & J. 142.

(*z*) *Sollory* v. *Leaver*, 21 L. T. N. S. 453, upholding *Buttery* v. *Robinson*, 3 Bing. 392.

(*a*) *Mitchell* v. *Holmes*, 28 L. T. N. S. 72; *Mitchell* v. *Moorman*, 1 You. & Jer. 21.

Part I. Chap. III.

(s) Grantees of rent-charges.

As we have said before (*b*), the grantee of a rent-charge can distrain for arrears of rent when empowered to do so by deed; and in the absence of such a power under the provisions of the 4 Geo. II. c. 28 (*c*); but a rent-charge with a power of distress cannot be created, except by a grant binding some legal interest in the land; and it ceases to exist when the same person who is owner o the rent becomes entitled to the whole legal estate in the land out of which it issues (*d*). A devise of lands to A. for life, remainder to B. in fee, subject to and charged with the payment of 20*l.* to C. during her life, to be paid by A. as long as she should live, and after her decease to be paid by B., is a charge on the land for which C. may distrain (*e*).

The assignee of a rent-charge may distrain for arrears thereof which become due after the assignment (*f*), but not for previous arrears (*g*).

Distress by assignee of a rent-charge.

On the other hand, the grantee of a rent-charge cannot divide his demand, and distrain for part on one part of the land, and afterwards for the residue on the other (*h*); for a man who has an entire duty cannot split the entire sum, and distrain for part of it at one time, and for another part at another time, and so on, "*totics quoties*" (*i*). And although the power of distress is nugatory, it appears that

(*b*) *Ante*, p. 15.

(*c*) *Dodds* v. *Thompson*, L. R. 1 C. P. 133.

(*d*) *Freeman* v. *Edwards*, 2 Exch. 732.

(*e*) *Buttery* v. *Robinson*, 3 Bing. 392.

(*f*) *Maund's case*, 7 Co. Rep. 28.

(*g*) *Brown* v. *Metropolitan Counties Life Assurance Society*, 1 E. & E. 832. See also *In re Davis & Co., Ex parte Rawlings*, W. N. 1888, p. 236.

(*h*) *Owens* v. *Wynne*, 4 El. & Bl. 579; *Wallis* v. *Savill*, 2 Lutw. 1532.

(*i*) Per Wightman, J., in *Owens* v. *Wynne*, *supra*, who distinguishes *Rivis* v. *Watson*, 5 M. & W. 255, *ante*, pp. 46, 51, saying, that that case was no authority that he to whom an entire demand was due could split it up and distrain for part on one part of the land; it *was* an authority that the right to the rent might be divided, and then at the time when rent became due, it was no longer an entire demand.

the rent-charge may be available for other purposes (*k*). The interest of a mortgagor in possession is not a legal estate at all, and consequently cannot support a rent-charge with powers of distress. So a grant purporting to be the grant of a rent-charge, with powers to distrain made by a person having a legal estate in the land, may operate as an irrevocable licence by the grantor to seize such goods as may be on the land at the time the grantee seizes, and to treat them as a distress; and may therefore justify the seizure of the goods of the grantor himself, and give the grantee an interest in them after seizure; but it does not give any interest in the goods of the grantor before seizure, and does not justify the seizure of the goods of third persons at all (*l*).

Where a mortgagor, who had the equity of redemption in fee, and the mortgagee, the legal owner of lands in fee, conveyed the lands to the second mortgagees and their heirs with a power of sale, and there was a proviso in the deed that in the event of the second mortgagees, or of anyone claiming under them, entering under that power, the land should thenceforth for ever be charged with the payment to the mortgagor, his heirs and assigns, of an annual sum of 40*l*., recoverable by distress, which deed was not executed by the second mortgagees, who, in default of payment, entered the lands, and sold them to A., subject to this annual sum, who himself entered and subsequently conveyed the land to the plaintiff, in the meantime paying the mortgagor the annual sum; and the rent-charge afterwards vested in the defendant, who distrained for the same; it was held that the defendant was justified in distraining, as the rent-charge was well created, and valid at law, under the Statute of Uses (*m*), and that it was not void as commencing at a period too remote, and so contra-

(*k*) *Dawson* v. *Robbins*, L. R. 2 C. P. D. 38; *Dodds* v. *Thompson*, L. R. 1 C. P. 133.

(*l*) *Gilbertson* v. *Richards*, 5 H. & N. 453.

(*m*) 27 Hen. 8, c. 10.

Part I. Chap. III.

vening the rule against perpetuities (*n*). By the Conveyancing and Law of Property Act, 1881 (*o*), it is provided that "where a person is entitled to receive out of any land any annual sum, payable half-yearly or otherwise, whether charged on the land, or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, then subject, and without prejudice to all estates, interests, and rights having priority to the annual sum, and so far only as might have been conferred by the instrument under which the annual sum arises, the person entitled to receive the annual sum may, if at any time the same, or any part thereof, is unpaid for twenty-one days next after the time appointed for payment, enter into and distrain upon the land charged, or any part thereof, and dispose according to law of any distress found."

Conveyancing Act, 1881.

(t) Owners of tithes.

The rent-charges created under the various Acts for the commutation of tithes are of a somewhat anomalous nature, and the remedy by distress differs in some respects from that given for the recovery of ordinary rent-charges: we have therefore thought it better to deal with this subject separately. Tithes are of a very ancient origin, and their incidence on property having become objectionable to the nation at large, it was thought better to provide some means by which these objections might be remedied, and at the same time to secure to the owners of the tithes the rights and properties to which they were legally entitled. This was effected by the Tithe Commutation Act (6 & 7 Will. IV. c. 71), and the various statutes passed for its amendment (*p*). They provide that the commutation may

Objections to tithes.

6 & 7 Will. 4, c. 71.

Provisions of

(*n*) *Gilbertson* v. *Richards*, *supra*.

(*o*) 44 & 45 Vict. c. 41, s. 44, sub-ss. 1, 2.

(*p*) These are 7 Will. 4 & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 23 & 24 Vict. c. 93; 36 & 37 Vict. c. 42; 41 & 42 Vict. c. 42.

the various statutes.

be effected in two ways; either by a voluntary parochial agreement entered into by a certain proportion of the parties interested, and confirmed by the Board of Commissioners, to whom this subject has been entrusted (*q*), or else by compulsory award. And for this latter purpose, the Commissioners were required to take, as the basis of the commutation (with certain exceptions), the clear average value of the tithes of the parish, or of the composition payable for the same, where they had been compounded for, for the period of seven years ending at Christmas, 1835 (*r*). The payments to the former tithe owner under such commutation are to be half-yearly, and the amount thereof is to fluctuate according to the price of corn (*s*).

Difference between tithe rent-charge and ordinary rent-charge.

But the points in which the rent-charges thus created differ from ordinary rent-charges are, that they are universally payable half-yearly; that instead of being certain and uniform in amount, they are liable to a continual change from year to year, according to the average price of corn; that a distress for them cannot be made until they have been in arrear for twenty-one days, nor until a ten days' notice has been given; that only two years' arrears can in any case be recovered, and that the power of distress extends to all lands within the parish occupied by the owner, or under the same land or holding (*t*).

Power is given to recover such rent-charge at the suit of the person entitled thereto, his executors or administrators, by distress and entry, as follows. By the 81st section of the 6 & 7 Will. IV. c. 71, it is enacted, that "in case the said rent-charge shall at any time be in arrear, and unpaid, for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or

(*q*) 6 & 7 Will. 4, c. 71, s. 2.

(*r*) 6 & 7 Will. 4, c. 71, s. 37.

(*s*) Steph. Com. 8th ed. vol. ii. p. 733.

(*t*) Bullen, 218.

left ten days' notice in writing at the usual or last-known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act or demean himself in relation thereto, *as any landlord may for arrears of rent reserved on a common lease for years;* provided that not more than two years' arrears shall at any time be recoverable by distress."

Where tithe rent-charge was in arrear, and the owners found nothing upon the land upon which to distrain, nor were there any rents or profits issuing out of the land, nor any means by which, if the plaintiffs took possession of the land, they could repay themselves the arrears of the rent-charge; upon action to recover the arrears, it was held that the tithe rent-charge was a charge on the produce, and not on the inheritance; that the plaintiffs were not entitled to sell the land or any part thereof to pay the arrears; that their only remedies were those given by the above Act, viz., distress or entry; and that in any case they could not recover more than two years' arrears (*u*).

The person entitled to the rent-charge in lieu of tithes is not entitled to an indemnity in lieu of double costs under 5 & 6 Vict. c. 97, s. 2 (*x*).

Right of entry where rent-charge is in arrear.

The 82nd section gives a remedy by entry, where the rent-charge is in arrear for forty days, and there is no sufficient distress upon the premises. The owner of a rent-charge may obtain possession of the land under this section, although he has not attempted to distrain (under sect. 81) at the end of each successive half year in which default was made, and although it may be that twenty-one days after the determination of any such prior half year there was a sufficient distress upon the premises (*y*). But

(*u*) *Bailey* v. *Badham*, 30 Ch. D. 84.

(*x*) *Newnham* v. *Bever*, 8 C. B. 560.

(*y*) *In re Camberwell Rent-Charge*, 4 Q. B. 151.

he is bound, in estimating whether there is any sufficient distress under the 82nd section, to include the value of the growing crop, although in not such a state as to come to maturity and be capable of realization within forty days from the day of entry (*z*).

Provisions in case of Quakers.

The 84th section lays down express provision in the case of Quakers, "that a distress under that Act may be made upon the goods, chattels, or effects of such persons, whether on the premises or elsewhere; but nevertheless to the same amount only, and with the same consequence in all respects as if made on the premises; and that in all cases of distress under this Act upon persons of that persuasion, the goods, chattels, or effects, which may be distrained, shall be sold, without its being necessary to impound or keep the same."

It will be seen that the remedy here looks not only to the land, but also to the personal estate of the defaulter, and has the force both of a distress and of an execution; for on the one hand, it extends to everything of a distrainable nature on the premises, no matter to whom it may belong; whilst, on the other, it follows the effects of the tenant himself, wherever they may be found (*a*).

By the 85th section it is enacted, that "whenever any rent-charge, payable under the provisions of this Act, shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been charged, whether such lands shall be occupied by the person occupying the same as the owner thereof, or as

(*z*) *Heysham* v. *Heskett, Ex parte Arnison*, L. R. 3 Ex. 56; in which case, Kelly, C. B., says, "that under the 6 & 7 Will. 4, growing crops are distrainable."

(*a*) Bullen, 223.

tenant thereof, holding under the same landlord under whom he occupies, the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained upon (or entered upon) for the purpose of satisfying any arrears of such rent-charge whether chargeable upon the lands on which such distress is taken or such entry made, or upon any other part of the lands so occupied or holden; provided always, that no land shall be liable to be distrained (or entered upon) for the purpose of satisfying such rent-charge charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any other natural casualty."

Summary remedy given in respect of Lammas lands and commons in gross.

A more summary remedy than distress for the ordinary commutation rent-charge is given by the statute 2 & 3 Vict. c. 62, s. 13 (*b*), in respect of the occupation of Lammas lands and commons in gross, which enacts, that "where the rent-charge cannot, in the judgment of the Commissioners, be fixed on the said lands in respect of cattle and stock received and fed thereon, or of the produce and increase of such cattle and stock at such portions of the year as the said lands are thrown open, or where such right of commonage alone exists, it shall be lawful for the parties interested in the tithes to fix a rent-charge instead of the tithes, and to declare such a sum, or rate per head, to be paid for each head of cattle or stock turned on to such Lammas land after the same shall have been so thrown open, or by the parties entitled to such right of commonage, every such sum to be calculated according to the provisions for fixing rent-charges in the previous Acts, and to be recoverable by *distress and impounding of the cattle or stock in respect of which such sum shall be due*, and be subject to the same provisions as to distress and replevin of the same as are by law provided in cases of distress for rent."

This is more summary, insomuch as it is not necessary

(*b*) Amended by 3 Vict. c. 15, s. 15.

that any period should intervene between the moment the rent-charge is payable and the distress, or that any previous notice should be given. It bears a strong resemblance to a distress of things damage feasant; particularly as each head of cattle or stock is distrainable for its own individual and separate charge only (*c*).

By an Inclosure Act a corn rent was payable in lieu of tithes by the person "occupying and in possession of the lands;" it was held that these rents were due, although part of the time the lands were unproductive and uncultivated, and that whilst the landlord was legally in possession, so as to be liable to the burdens imposed by statute, the tenant under him was liable to be distrained for the arrears of rent (*d*).

Tithes, being incorporeal hereditaments, must be demised by an instrument under seal; and therefore where they were demised by an instrument not under seal, and no distinct and ascertained rent was reserved, it was held that a distress for their non-payment was illegal (*e*).

Under the provisions of 38 Geo. III. c. 5, s. 17, a distress was made for a past half-year's arrears of certain tithes, there being due an assessment for the current half; it was held that the collector could not apply the sum which was in excess of the past half year to the claim under the present half year, no demand in the current half year having been made (*f*).

By a local Inclosure Act a Commissioner was appointed to make a schedule of certain old enclosed lands, and apportion upon them the rent-charge which was to be imposed in lieu of tithes. The lands were to be thenceforth exclusively liable to the payment of so much of the yearly rent as should be specified in the schedule, and such apportioned part might be recovered from the lands

(*c*) Bullen, 226.

(*d*) *Newling* v. *Pearce*, 1 B. & C. 437; *Bendyshe* v. *Pearce*, 4 Moore, 99.

(*e*) *Gardiner* v. *Williamson*, 2 B. & Ad. 336.

(*f*) *Charleton* v. *Alway*, 11 Ad. & Ell. 993.

Part I. Chap. III.

charged therewith, or from the owners thereof, in the same manner as the whole of the yearly rents were thereby made recoverable. It was held that a distress for a joint sum, being the amount of rent-charge imposed upon lands acquired before the Act, plus the amount imposed upon other lands acquired since the Act, was illegal; but that a distress upon an occupier of some of the lands belonging to the same proprietor, for the whole rent-charge imposed upon all the lands of such proprietor, comprising lands not in the same occupation, but of which such proprietor was the owner, was legal (*g*).

(u) Guardians.

Before the statute 12 Car. II. c. 24, which changed the ancient military tenures into socage tenure, the rights of guardians were of more importance than they are at the present day. Guardians in socage, and testamentary guardians appointed under the authority of this statute, as they do not derive their title from the infant himself, but from the appointment of the law, are considered as having not a bare authority, but an interest in the lands of the infant; and therefore may make leases of his lands in their own names, which will be good during the minority of the ward (*h*); and, consequently, in respect of such leases, they possess the same powers of distress as other persons granting leases in their own right (*i*).

By the Guardianship of Infants Act, 1886 (*k*), provisions are made as to the appointment of guardians, and by sect. 4 it is enacted that every guardian under that Act shall have all such powers over the estate of infants as a

(*g*) *Bedford* v. *Wardens of Sutton Coldfield; Silvester* v. *Bedford*, 3 C. B. N. S. 449.

(*h*) *Wade* v. *Baker*, 10 East, 495, *in notis;* see also 7 Will. 4 & 1 Vict. c. 26, which enacts that the father, if under age, cannot appoint a guardian *by will.*

(*i*) *Shopland* v. *Rydler*, Cro. Jac. 55, 98; *Bedell* v. *Constable*, Vaugh. 179; Bradby, 62. See also 3 Bac. Abr. 403; 4 idem, 138; Gwill. ed. Guard. (A); Lease (1), 9; 2 Byth. & Jarm. 404.

(*k*) 49 & 50 Vict. c. 27. As to County Courts, see County Court Rules, 1889, Order XLVII.

guardian appointed by will or otherwise now has under the Act 12 Car. II. c. 24.

(v) Committees of lunatics.

Committees of lunatics are enabled by statute 16 & 17 Vict. c. 70, s. 113, to make leases and surrender, and renew them, in the name and on behalf of the lunatic, under the direction of the Lord Chancellor (*l*), and therefore are entitled to distrain, like other lessors, for the rent reserved.

(w) Husbands and wives.

It has always been held at the common law that where the wife had an estate of freehold in lands, the immediate reversion of those in lease was in the husband and wife jointly; and a joint distress might be made for the rent, whether accruing before or after the coverture. But where the reversion was a chattel real, the husband might, during the coverture, reduce it into possession, and distrain alone for the rent (*m*). After the death of the wife the husband might distrain alone for rent due in right of his wife in her lifetime, even if it accrued to her in "*autre droit*," as executrix or administratrix (*n*). But if the husband died without reducing the chattel real of his wife into possession it survived to her, and the arrears of rent, whether accrued before or during coverture, went with the reversion to the surviving wife, and might be distrained for by her accordingly (*o*). If arrears of rent on lands in which the wife had a freehold interest accrued before the coverture, the surviving husband was not entitled to them; if they accrued during the coverture, he was; but if the wife survived, such arrears belonged to her, and did not go to the husband's executors (*p*). The husband's rights

Enlargement

(*l*) See also 18 & 19 Vict. c. 13, s. 129; General Order in Lunacy, 7th Nov. 1853, No. 54.

(*m*) *North* v. *Wyard*, 2 Bulstr. 233; *Bowles* v. *Poore*, Cro. Jac. 282; *Pullen* v. *Palmer*, 3 Salk. 207.

(*n*) *Osborne* v. *Wickenden*, 2 Saund. 195; *Ankerstein* v. *Clarke*, 4 T. R. 617; *Parry* v. *Hindle*, 2 Taunt. 181.

(*o*) Co. Litt. 351 a; 1 Roll. Abr. 350.

(*p*) *Ognel's case*, 4 Rep. 51 a; Co. Litt. 162 b, 351; Bullen, 56.

Part I. Chap. III.

of the husband's rights.

in this respect were enlarged by the statute 32 Hen. VIII. c. 37, s. 3, which provides that "if a man has a freehold interest in right of his wife in any rents or fee-farms, and the same be unpaid in the wife's life, then the husband, after the death of his wife, may have an action of debt against the tenant, or against his executors or administrators; and may distrain for such arrears in like manner as he might have done if his wife had been living." But he may not distrain for subsequently-accruing rent, unless he be tenant by the curtesy (*q*).

This statute has been held not to apply to the rent reserved upon leases for years (*r*). But now, by the 3 & 4 Will. IV. c. 42, s. 37 (*s*), "the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will, for the arrears of rent due to such lessor or landlord in his lifetime in like manner as such lessor or landlord might have done in his lifetime."

It may be doubted how far the Married Women's Property Act, 1882 (*t*), has affected the law upon this subject. The term "property" in the Act includes a chose in action, and a chose in action includes arrears of rent (*u*). If a husband has married since this Act came into force, he has no interest in his wife's choses in action, unless acquired by some agreement (*x*); nor has he any, where he was married before the Act came into force, if his wife's title to her choses in action accrues since that date.

(x) Receivers and agents.

Whoever distrains as agent for another must make the distress in the name of the person legally entitled to the rent. Receivers also are subject to the same rules, whether

(*q*) *Howe* v. *Scarrott*, 4 H. & N. 723.

(*r*) *Prescott* v. *Boucher*, 3 B. & Ad. 849.

(*s*) See *ante*, p. 58.

(*t*) 44 & 45 Vict. c. 75.

(*u*) *Salwey* v. *Salwey*, Amb. 693.

(*x*) Sect. 1, sub-s. 2, and s. 24.

appointed privately by deed, or by the Court of Chancery; for having no estate in the land they are considered merely as bailiffs, or stewards, distraining under the person who appointed them, and in his name; or, where appointed under the sanction of the Court, in the name of the person legally entitled to the rent. But if the parties having the legal estate make a demise to the receiver to enable him to collect the rents, instead of appointing him receiver in the ordinary way, he may distrain, like any other trustee, in his own name (*y*). And where a receiver without any authority made a lease, reserving rent, and distrained in his own name; it was held that the lessee was estopped from disputing such distress (*z*). A private receiver should have an express and specific authority given to him in order to enable him to distrain. Thus, where the assignees of a bankrupt gave to the bankrupt an authority in writing to receive the rents, and that his receipt should be a complete discharge; it was held that such authority did not confer a power to distrain (*a*); Bosanquet, J., observing that, "there is a wide difference between powers which are given and construed by the Court, and those which are given and interpreted by private individuals." By a deed executed contemporaneously with a mortgage in fee, which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso that if default should be made in payment of the mortgage money, or interest, at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There

Powers of receiver to distrain.

Private receiver must have express authority.

(*y*) Bullen, 72.

(*z*) *Dancer* v. *Hastings*, 4 Bing. 2.

(*a*) *Ward* v. *Shew*, 9 Bing. 608.

Part I. Chap. III.

was also a proviso that nothing therein contained should lessen the rights, powers, or remedies of the mortgagee under the mortgage. On the mortgagor being found bankrupt, it was held that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain, and take the goods which belonged to the mortgagor on the mortgaged premises (*b*).

Receivers appointed by the Court.

But receivers appointed by the Court of Chancery have a power, where they think it necessary, to distrain; and they need not apply to the Court in the first instance for a particular order for that purpose (*c*). For, as that Court never makes an immediate order, but appoints a future day for a tenant to pay, it might be an injury to the estate to wait till that time, as it would give the tenant the opportunity of conveying his goods off the premises in the meantime. If, however, there is any doubt who has the legal right to the rent, then the receiver should make an application to that Court for an order, as he must distrain in the name of the person who has that right (*d*); unless the tenant has attorned to the receiver, and so created a tenancy by estoppel between himself and the receiver. But this attornment does not enure to enable the person who is ultimately found to have the legal title to the land to treat the tenant as his tenant, and to distrain; for if that were the case, the object of the Court of Chancery in appointing a receiver would often be effectually defeated (*e*).

A mortgagee appointed a receiver of the income of the

(*b*) *Jolly* v. *Arbuthnot*, 4 De G. & J. 224.

(*c*) *Bennett* v. *Robins*, 5 C. & P. 379; *Brandon* v. *Brandon*, 5 Madd. 473; *Dancer* v. *Hastings*, 4 Bing. 2; *Pitt* v. *Snowdon*, 3 Atk. 750.

(*d*) *Pitt* v. *Snowdon*, *supra*; *Hughes* v. *Hughes*, 3 Bro. Cha. Ca. 87.

(*e*) *Evans* v. *Mathias*, 7 Ell. & Bl. 590; *White* v. *Smale*, 26 Beav. 191; *Barton* v. *Rock*, 22 Beav. 81; *Jolly* v. *Arbuthnot*, *supra*; Woodf. L. & T. 12th ed. 401.

mortgaged property under the Conveyancing Act, 1881, and gave notice of the appointment to the mortgagor. The mortgagor nevertheless distrained for rent becoming due after the appointment of the receiver. The mortgagor claimed to distrain for the protection of the property, alleging that the receiver had been negligent in collecting the rent. It was held that an injunction must be granted to restrain the mortgagor from interfering with the receiver for receiving the rent. Even if the mortgagor had proved negligence on the part of the receiver, it is questionable whether distraining for the rent was the proper mode of protecting his interests (*f*).

A chief clerk by his certificate found that a certain sum was due from the defendants as an occupation rent. Before the certificate had become binding upon the defendants, the plaintiffs moved for leave for the receiver in the action to distrain for rent, or that the defendants should give some security. It was held that the motion must stand over until the certificate had become binding (*g*).

Agents.

The right of a person to do an act with regard to the property of another depends upon the authority or right which he really has to do the act, and not upon that which he says he has. Therefore if a person, having authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other (*h*). And where a mortgage has been paid off by the assignee of the equity of redemption, who takes from the mortgagee an undertaking to execute a re-assignment of the mortgage, the assignee has an implied authority to distrain in the name of the mortgagee; because the agreement to transfer or re-assign implies an authority to the assignee to do anything in the

(*f*) *Bayly* v. *Went*, 51 L. T. N. S. 764.

(*g*) *Craven* v. *Ingham*, 58 L. T. N. S. 486.

(*h*) *Trent* v. *Hunt*, 9 Exch. 14; *Wootley* v. *Gregory*, 2 You. & J. 536.

name of the mortgagee which the assignment or extinguishing of the terms would have empowered him to do on his own behalf (*i*).

Where a power of attorney was executed to H. R., which contained an authority to demand and recover rents, and "to depute one attorney or attornies under him," &c.; it was held that H. R. had power to authorize another to make a distress for rent (*j*).

Authority of bailiff to receive rent and costs.

A bailiff who acts under a warrant of distress, has an implied authority to receive the amount of the rent and costs, if tendered by the tenant; and such authority cannot be limited by an express instruction, given on behalf of the landlord, to the bailiff not to receive the rent, but to refer the tenant to the landlord's solicitor (*k*).

A landlord does not lose his right of distress under sect. 42 of the Bankruptcy Act, 1883 (*l*), though the goods be in the custody of a receiver in bankruptcy (*m*).

(y) Corporations.

Corporations, with reference to their powers of distress, may be divided into corporations sole, and corporations aggregate. Their respective rights as regards distress differ from those of ordinary persons.

1. Corporations sole.

And first, of corporations sole.

Crown or its grantees.

The Crown, by its prerogative, is entitled to peculiar

(*i*) *Snell* v. *Finch*, 13 C. B. N. S. 651.

(*j*) *Eagleton* v. *Gutteridge*, 11 M. & W. 465.

(*k*) *Hatch* v. *Hale*, 15 Q. B. 10. As to cases where agents exceed their authority in distraining, see *Lewis* v. *Read*, 13 M. & W. 834; *Freeman* v. *Rosher*, 13 Q. B. 780; *Oxenham* v. *Smythe*, 6 H. & N. 690; *Rawlings* v. *Bell*, 1 C. B. 951; *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Exch. 422; *Hurry* v. *Rickman*, 1 Moo. & Rob. 126; *Parrott* v. *Anderson*, 7 Exch. 93; *Toplis* v. *Grane*, 5 Bing. N. C. 636; *Haseler* v. *Lemoyne*, 5 C. B. N. S. 530; and see *post*, pp. 207, 208.

(*l*) 46 & 47 Vict. c. 52.

(*m*) *Ex parte Cochrane, Re Mead*, L. R. 20 Eq. 282; *Ex parte Plummer*, 1 Atk. 103; *Ex parte Till, Re Mayhew*, L. R. 16 Eq. 97; *Ex parte Eatough, Re Cliffe*, 42 L. T. N. S. 95.

legal remedies, and amongst others to a more ample and beneficial power of distress than belongs to a subject. Thus at common law, if a grant of land or rent was made to the Crown, it could distrain without attornment by virtue of its prerogative (*n*). And the Crown may distrain for a rent-service or fee-farm rent, not only on the land of its tenant out of which it is reserved or granted, but also on all other lands of the tenant, although held of other persons (*o*). And this applies to rent-charges and rents-seck at common law, whether the rent vest in the Crown by grant, or otherwise; but the lands to be distrained upon must be in the actual possession of the tenant (*p*); for if they be underlet for years, or at will, the under-tenant's effects are not liable to the Crown (*q*); but if the tenant of the Crown makes an underlease *after* the arrears of rent accrued due, the Crown has a right of distress upon the lands of its under-tenant (*r*).

Where claims of the Crown and of a subject as creditors come into competition, the prerogative right of the Crown to priority is not limited to proceedings by writ of extent, but equally attaches in proceedings by distress, although the distress put in by the Crown is subsequent in date to that of the subject, provided that the distress put in by the subject has not been completely executed by actual sale (*s*).

The Crown may distrain on the highway.

The Crown, by virtue of its prerogative, may also distrain on the highway (*t*).

Grantees of the Crown.

The grantees of the Crown also have some peculiar

(*n*) Co. Litt. 309.

(*o*) Bro. "Prerog." pl. 77.

(*p*) 4 Inst. 119; 2 Inst. 132.

(*q*) Bro. Abr. "Prerog." pl. 68, 77; 3 Leon. 124; *Warden and Commonalty of Sadlers' case*, 4 Co. Rep. 56; 16 Vin. Abr. 513, 514, tit. "Prerog."; F. Bac. Abr. "Prerog." (E), 3; Chitty, jun. on Prerogatives, pp. 208, 209.

(*r*) 1 Roll. Abr. 670.

(*s*) *Att.-Gen.* v. *Leonard*, 38 Ch. Div. 622.

(*t*) 2 Inst. 131.

Part I. Chap. III.

privileges with regard to distress (*u*); for at the common law, if the Crown granted to its subject a reversion or services, it passed immediately without attornment, and the grantee might distrain (*x*), unless it were of lands held of the Duchy of Lancaster, and not situate within the County Palatine (*y*).

The statute 22 Car. II. c. 6 (for the sale of the fee-farm rents of the Crown) gives to the vendees of such rents the same remedies for the recovery of them as were possessed by the Crown; and, therefore, they may distrain upon all the lands of the original grantor. And either the Crown or its vendees may make such a distress, although the lands distrained upon be under a sequestration (*z*); but this statute only extends to fee-farm rents sold under its authority; and, therefore, the Crown's grantee of a rent-charge cannot now, any more than he could at the common law, distrain on any other lands than those upon which the rent is charged (*a*). With these exceptions corporations sole do not possess any peculiar rights, or lie under peculiar disabilities with regard to the power of distress, but fall under the general principle of distraining according to the nature of their estate (*b*).

2. Corporations aggregate.

Corporations aggregate, whether civil or ecclesiastical, cannot, as a general rule, perform any act *in pais*, except under their common seal (*c*); and therefore they must both make and accept leases, or other conveyances of land, and

(*u*) A distress cannot be levied for sewer rates within the precincts of a royal palace occupied as the residence of the sovereign, and Kensington Palace is within this description; *Att.-Gen.* v. *Donaldson*, 10 M. & W. 117.

(*x*) Bro. Abr. "Prerog." pl. 68; 16 Vin. Abr. 513, 514; 1 Roll. Abr. 294.

(*y*) Co. Litt. 341 b; *Duchy of Lancaster's case*, 4 Inst. 209; Chitty, jun. on "Prerog." 209.

(*z*) *Att.-Gen.* v. *Mayor of Coventry*, 2 Vern. 713.

(*a*) Bro. "Prerog." pl. 68, see Statham, Abr. "Distress," pl. 2; Bradby, 63.

(*b*) Bullen, 77.

(*c*) *Mayor of Thetford's case*, 1 Salk. 192; *Arnold* v. *Poole*, 4 M. & G. 860.

grants of rent, under such seal. But if a lease be made by an agent of a corporation, not under their common seal, although it be invalid as a lease for want of due execution, yet, if the tenant hold under it, and pay rent to the bailiff of the corporation, that is sufficient to constitute a tenancy at least from year to year, and to entitle the corporation to distrain for the rent (*d*). Where leases are made by corporations aggregate or sole, whether or not they are made conformable to statutory provisions, so as to bind the successor, the remedy of distress, at least with respect to the lessor, is the same as belongs to such a lease at common law. For though leases contrary to these Acts are declared void, yet they are good against the lessor during his life, if he be a corporation sole; and also against an aggregate corporation, so long as the head of it lives, who is presumed to be the most concerned in interest (*e*). Therefore, if good against the lessor, they would generally be good against the lessee by mutuality of estoppel (*f*).

By 4 Geo. II. c. 28, s. 5, bodies politic and corporate are placed on the same footing as other persons with respect to the recovery of rents-seek, chief rents, and rents of assize.

Power of corporation to appoint a bailiff.

A corporation may appoint a bailiff to distrain without deed or warrant (*g*). And this also applies to distress damage feasant (*h*). And a corporation is liable in tort

(*d*) *Dean and Chapter of Rochester* v. *Pierce*, 1 Camp. 466; *Furley and Mayor of Canterbury* v. *Wood*, 1 Esp. 198; *R.* v. *Chipping Norton*, 5 East, 239, 242; *Southwark Bridge Company* v. *Sills*, 2 C. & P. 371; *Smith* v. *Barrett*, 1 Sid. 162; *Patrick* v. *Balls*, Carth. 390; *Wood* v. *Tate*, 2 New R. 247; *Carter* v. *Dean and Chapter of Ely*, 7 Sim. 211, 217; *Bird* v. *Higginson*, 6 A. & E. 824; *R.* v. *North Duffield*, 3 M. & S. 247; 1 Kyd on "Corp." 263; Woodfall's Landlord and Tenant, 10th ed. p. 17.

(*e*) 2 Black. Com. 321.

(*f*) Bradby, 64.

(*g*) *Carey* v. *Mathews*, 1 Salk. 191. See *post*, pp. 207, 208, 211—213, as to the necessity of bailiffs to be certified.

(*h*) *Manby* v. *Long*, 3 Lev. 107; Bac. Abr. Corporations (E), 3, vol. ii. p. 265, ed. 1832.

for the tortious acts of its agent, though not appointed by seal, if such act be an "ordinary service," such as a distress professedly made under a statute for a debt due to the corporation; and the jury may infer the agency from an adoption of the act by the corporation, as from their having received the proceeds of the seizure (*i*).

3. Parish officers.

The real property belonging to parishes is vested in the churchwardens and overseers of the poor for the time being, as a quasi-corporation, by the statute 59 Geo. III. c. 12, s. 17, and they are entitled to make leases of these lands. This Act does not extend, however, to copyholds (*k*). Under it churchwardens and overseers are a corporation of a peculiar kind. They may take by demise without acceptance under seal, and any one of them may authorize a distress for the rent (*l*).

(z) Sequestrators.

Sequestrators appointed by the Court of Chancery appear to stand on the same footing with regard to distress as receivers (*m*). By the 12 & 13 Vict. c. 67, a sequestrator is empowered to levy any distresses in his own name for the recovery of tithes, tithe rent-charge, or rent, &c., payable to the incumbent of the sequestered benefice. A sequestration issued by a bishop under the statute 1 & 2 Vict. c. 106, though partly in the nature of a distress, is partly in the nature of a penalty (*n*).

(*i*) *Smith* v. *Birmingham and Staffordshire Gas Light Company*, 1 Ad. & Ell. 526; *Church* v. *Imperial Gas Company*, 6 Ad. & Ell. 861.

(*k*) *Doe* d. *Bailey* v. *Foster*, 3 C. B. 215.

(*l*) *Smith* v. *Adkins*, 8 M. & W. 362; *Gouldsworth* v. *Elliott*, 11 M. & W. 337; Smith's L. & T. 3rd ed. 73, 74, note (*n*); Woodf. L. & T. 10th ed. 67. See *post*, Chap. XIII.

(*m*) Woodfall's L. & T. 10th ed. 393; *Cornish* v. *Searall*, 8 B. & C. 471; but see *Hall* v. *Butler*, 10 A. & E. 204.

(*n*) *Bonaker* v. *Evans*, 16 Q. B. 162.

CHAPTER IV.

WHO MAY DISTRAIN IN THE CASE OF MORTGAGES, BANKRUPTCY, AND THE WINDING-UP OF COMPANIES.

(a) Mortgages.

The question of how far the execution of a mortgage affects the right of distress is one of great difficulty, and has led to very many decisions. It therefore becomes necessary to consider the position of the mortgagee and mortgagor as between themselves, and also their position where tenancies have been created with third parties, either previously or subsequently to the date of the mortgage deed. We propose to discuss, first, the relation between the mortgagor and the mortgagee, where the former remains in possession of the estate; and secondly, the rights of both parties under tenancies which have been created *before* and *after* the date of the mortgage deed respectively.

Firstly, then, as to the relation between the mortgagor and the mortgagee.

Where the former remains in possession of the mortgaged estate, without any express provision that he intends to do so, great difficulty has been experienced in defining the precise relation in which both parties stand to each other. But it may be summed up shortly, that a mortgagor in possession is one who, having parted with his estate, remains in possession at the will, and consistently with the right of the grantee, exercising the ordinary rights of property, yet liable, at the option of the mortgagee, to be treated either as a tenant or as a trespasser (*a*).

Mortgagor in possession.

(*a*) Fisher on Mortgages, 3rd ed. vol. i. pp. 442, 443, and cases therein cited; and see *Thunder* v. *Belcher*, 3 East,

Part I. Chap. IV.

Attornment.

A mortgage deed often contains an agreement that the mortgagor shall be tenant to the mortgagee at a rent in case of interest being in arrear; and sometimes a *mere power* is given to the mortgagee to distrain for interest, in which case no tenancy is created (*b*).

And although the mortgage deed which creates the attornment has not been executed, yet if the circumstances are sufficient to create the presumption that the relation of landlord and tenant was intended to exist, a distress will be upheld (*c*). But it seems that some notice must be given by the mortgagee to the mortgagor showing an intention to change the relationship from that of mortgagee and mortgagor to that of landlord and tenant; and a distress levied by the mortgagee without any such notice, upon the goods of a third party which are upon the mortgagor's premises, for rent due since the mortgagor's default, cannot be justified (*d*). On the other hand, the mortgagor cannot determine the tenancy at will, so as to affect his right to distrain, by transferring his interest to another without notice to the mortgagee (*e*). But an attornment clause is not intended to enable the mortgagee to repay himself any of the capital advanced, but only to secure the payment of rent, interest, and premiums (*f*).

Separate attornments.

Where there are separate attornments by mortgagors

450; *Smartle* v. *Williams*, 1 Salk. 246; *Litchfield* v. *Ready*, 20 L. J. Ex. 51; *Wilton* v. *Dunn*, 17 Q. B. 299, per Patteson, J.; *Hickman* v. *Mackin*, 4 H. & N. 722, per Watson, B.

(*b*) *Doe* v. *Davies*, 7 Exch. 89; *Anderson* v. *Midland Rail. Co.*, 30 L. J. Q. B. 94; *Jolly* v. *Arbuthnot*, 28 L. J. Ch. 547; *Morton* v. *Woods*, L. R. 4 Q. B. 293; *Doe* d. *Wilkinson* v. *Goodier*, 10 Q. B. 957; *Freeman* v. *Edwards*, 2 Exch. 732; *Pinhorn* v. *Souster*, 8 Exch. 763; *Turner* v. *Barnes*, 2 B. & S. 435.

(*c*) *West* v. *Fritche*, 3 Exch. 216; *Dancer* v. *Hastings*, 4 Bing. 34; *Jolly* v. *Arbuthnot*, *sup.*; *Morton* v. *Woods*, *sup.*

(*d*) *Clowes* v. *Hughes*, L. R. 5 Ex. 160; *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.

(*e*) *Pinhorn* v. *Souster*, 8 Exch. 763.

(*f*) *Hampson* v. *Fellowes*, L. R. 6 Eq. 578.

(who are partners) in respect of their undivided moieties, the mortgagee cannot, by means of simultaneous distresses upon the goods of each of them, take such as belong to them in common. Thus, in the case of *Ex parte Parke, Re Potter* (*g*), Potter and Ferridge mortgaged certain freeholds to Parke and others. In the mortgage deed Potter attorned to the mortgagees at a rent of 50*l.* as to one undivided moiety, Ferridge also attorned at a like rent of 50*l.* to the mortgagees as to the other undivided moiety. Default being made in payment, the mortgagees issued two separate distress warrants against Potter and Ferridge, under which the bailiff seized some bricks, the property of Potter and Ferridge *as partners*, there being no other goods on the land; it was held by Bacon, V.-C., that the landlords' (*i.e.*, the mortgagees') right of distress was to seize upon chattels that are on the land belonging to the tenant, but in exercising that right they could not seize chattels which belonged to other persons (*i.e.*, the partnership property), or in which the tenant had only a partial interest.

(1.) *Where a lease has been made before the date of the mortgage deed.*

By the mortgage the reversion passes to the mortgagee, and with it the right to receive the future rents, in addition to the other rights incident to the estate which formerly belonged to the mortgagor; and the tenant may pay the rent to the mortgagor, provided it be rent due *before* the execution of the mortgage; but if the tenant pay to the mortgagor a year's rent in advance, and after the payment and before the rent has become due, the mortgagees give him notice to pay it to them, they are justified in distraining, on his refusal to do so (*h*). If a lessor, after mortgaging, is permitted by the mortgagee to continue in

(*g*) L. R. 18 Eq. 381.
(*h*) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589; *Cook* v. *Guerra*, L. R. 7 C. P. 132.

receipt of the rent incident to that reversion, during such permission he is "*præsumptione juris*" authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, as his bailiff (*i*). And this also applies where a mortgage by demise has been paid off by the assignee of the equity of redemption, such assignee having an implied authority to distrain in the name of the mortgagee (*j*). In another case, however, it has been decided that although it may be necessary for the mortgagor to justify the distress as bailiff of the mortgagee, it is not necessary that the distress should be made in the mortgagee's name (*k*).

Judicature Act, 1873.

It is provided by the Judicature Act, 1873, sect. 25, subsect. 5, that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall be given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

Notice by the mortgagee.

But the mortgagee, by *giving notice* of the mortgage to the tenant, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice, although he was not in the actual seisin of the premises, nor in the receipt of the rents and profits thereof at the time the rent became due (*l*).

(*i*) *Trent* v. *Hunt*, 9 Exch. 14.

(*j*) *Snell* v. *Finch*, 13 C. B. N. S. 651.

(*k*) *Reece* v. *Strousberg*, 54 L. T. N. S. 133; *Dean of Christ Church, Oxford* v. *Duke of Buckingham*, 33 L. J. C. P. 322.

(*l*) *Moss* v. *Gallimore*, 1 Dougl. 279; 1 Sm. L. Cas. 6th ed. 561; *Pope* v. *Biggs*, 9 B. & C. 245; *Rawson* v. *Eicke*, 7 A. & E. 451. See *Carter* v. *Salmon*, 43 L. T. N. S. 490, *post*, pp. 295, 296.

(2.) *Where a lease has been made after the date of the mortgage deed.*

In this case it seems that the mortgagee cannot distrain by merely giving the tenant notice of the mortgage and requiring him to pay the rent reserved by the mortgagor to himself. Such notice alone is not sufficient; there must be an agreement or attornment by which a new tenancy is created between the mortgagee and the tenant (*m*).

An agreement, express or implied, as by a payment of rent to the mortgagee after notice, and an acceptance of it by him, will sufficiently create a tenancy between them (*n*). And a tenant of the mortgagor, whose tenancy has commenced since the mortgage, may, if obliged to attorn to the mortgagee under threat of eviction, dispute the mortgagor's title either to the land or the rent (*o*).

After the mortgagee has obtained payment of the rent, the tenant, in defending himself against a subsequent action by the mortgagor, is still not allowed to deny the mortgagor's title : he must admit it, and then show that it has been determined, and that he has been compelled to make the payment to the mortgagee (*p*).

But although the mortgagee may not distrain on the tenant when the lease is made after the mortgage, except by such notice as above, such lease is absolutely void as against the mortgagee, and the tenant under it is a tres-

(*m*) *Partington* v. *Woodcock*, 6 A. & E. 690 ; *Brown* v. *Storey*, 1 M. & G. 117 ; *Rogers* v. *Humphreys*, 4 A. & E. 299 ; *Waddilove* v. *Barnett*, 2 Bing. N. C. 538 ; *Doe* v. *Bucknell*, 8 C. & P. 566, overruling the judgment in *Pope* v. *Biggs*, *supra* ; and see *Evans* v. *Elliott*, 9 A. & E. 342.

(*n*) *Rogers* v. *Humphreys*, *supra* ; and *Evans* v. *Elliott*, *supra*.

(*o*) *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 314 ; *Mayor of Poole* v. *Whitt*, 15 M. & W. 571 ; *Delaney* v. *Fox*, 2 C. B. N. S. 768 ; *Carpenter* v. *Parker*, 3 C. B. N. S. 237.

(*p*) *Alchorne* v. *Gomme*, 2 Bing. 54 ; *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065.

passer whom he may eject without notice (*q*), even although he has treated the mortgagor as tenant by his previous conduct. Thus, where by a mortgage deed the mortgagor attorned to the mortgagee, and there was a proviso that the reservation of the rent should not prejudice the mortgagee's right to enter at any time after default made in payment of the money secured or any part thereof; it was held that after default made in payment of the principal, and of one half-year's rent, the mortgagee might eject the mortgagor, though he had treated the mortgagor as tenant by distraining on him for a previous year's rent (*r*).

But in a case where there had not been an actual attornment, but a mere personal licence "to distrain" for arrears of interest, in like manner as for rent, and the mortgagee under such power distrained after the date of the demise for arrears due before such demise, the mortgagor having continued in possession; it was held that such distress did not amount to a recognition of the mortgagor as tenant, so as to disable the mortgagee from bringing an ejectment (*s*).

Mere licence to distrain cannot be transferred.

A mere personal licence to distrain cannot be transferred (*t*).

Where lease is contemporaneous with the mortgage.

Where a lease was neither prior nor subsequent to, but contemporaneous with, the mortgage, it was held that as it was made under a power created by the same instrument, a notice of the mortgagee's to the tenant in possession

(*q*) *Keech* v. *Hall*, 1 Dougl. 21; *Thunder* v. *Belcher*, 3 East, 449.

(*r*) *Doe* d. *Garrod* v. *Olley*, 12 Ad. & Ell. 481; *Doe* d. *Snell* v. *Tom*, 4 Q. B. 615; *Brown* v. *Metropolitan Life Assurance Society*, 1 Ell. & Ell. 832.

(*s*) *Doe* d. *Wilkinson* v. *Goodier*, 10 Q. B. 957; *Pinhorn* v. *Souster*, 8 Exch. 763; *Freeman* v. *Edwards*, 2 Exch. 732; *Chapman* v. *Beecham*, 3 A. & E. 723.

(*t*) *Brown* v. *Metropolitan Companies Life Assurance Society*, *supra*. See also *In re Davis & Co., Ex parte Rawlings*, W. N. 1888, p. 236.

entitled him to rents due at the time of the notice, and gave a right to distrain for them (*u*).

(b) On bankruptcy of tenants.

By sect. 42, sub-sect. 1, of the Bankruptcy Act, 1883 (*x*), "the landlord, or other person to whom any rent is due from the bankrupt, may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for one year's rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available." And by sub-sect. 2, "for the purposes of this section the term 'order of adjudication' shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed 50*l.*, or of a deceased person who dies insolvent." The first clause of this section is to the same effect as sect. 34 of the Bankruptcy Act, 1869 (*y*), and the landlord's right to distrain for rent

(*u*) *Rogers* v. *Humphreys*, 4 A. & E. 299.

(*x*) 46 & 47 Vict. c. 52.

(*y*) 32 & 33 Vict. c. 71. See *Ex parte Morrish, Re Morrish*, L. R. 22 Ch. D. 410 and 425; *Wray* v. *Earl of Egremont*, 4 B. & Ad. 122. This latter section has been held inapplicable to sect. 10 of the Judicature Act, 1875, which enacts "that in the winding-up of any company under the Companies Acts, 1862 and 1867, as well as in the administration of the assets of any deceased person, whose estate is insufficient for the payment of his debts and liabilities, the rules of law in bankruptcy as to the respective rights of secured and unsecured creditors, as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, are to apply." See *Thomas* v. *Patent Lionite Co.*, L. R. 17 Ch. D. 250; *Re Coal Consumers' Co.*, L. R. 4 Ch. D. 625; *Re Therese & Co.*, W. N. 1879, p. 31; *Re Bridgwater Engineering Co.*, L. R. 12 Ch. D. 181; but see also *Re Stockton Iron Furnace Co.*, L. R. 10 Ch. D. 335. It has also been held that the 10th section of the Judicature Act, 1875, does not so far assimilate the rules in the winding-up of

accruing due after the order of adjudication is in no way limited either by this section (*z*), or by sect. 34 of the Act of 1869, and therefore the landlord has a perfect right to distrain for such rent as against a trustee in possession of the premises, and this though the rent be payable in advance (*a*). Nor does he lose his right under this section though the goods be in the custody of the receiver (*b*). So where, after a liquidation petition had been filed, and a receiver appointed, who had taken possession of the debtor's property, the debtor's landlord, without asking the leave of the Court, distrained for a year's rent due to him, and the County Court judge restrained the landlord from proceeding with his distress, and ordered him to be committed for a contempt of Court; it was held by Bacon, C. J., that the Court could not interfere with the statutory right given to the landlord by sect. 34 of the Bankruptcy Act, 1869, and the order for committal was discharged (*c*). But if the goods be removed, even by the trustee, from the premises, the landlord loses his preferential right, and may not follow them (*d*). And he will lose the benefit of any distress he may have made before bankruptcy if after distress he allows the goods to remain on the premises, and they are in the reputed ownership of the bankrupt at the commencement of the bankruptcy (*e*).

companies to the rules in bankruptcy as to give a collector of the Queen's taxes a right to distrain on the goods of a company in liquidation. See *Re Regent United Service Stores*, 8 Ch. D. 616.

(*z*) Sect. 42, sub-s. 1.

(*a*) *Ex parte Hale, Re Binns*, L. R. 1 Ch. D. 285. See *Ex parte Carter, Re Ware*, L. R. 8 Ch. D. 731, as to the position of the trustee after release with regard to rent due.

(*b*) *Ex parte Cochrane, Re Mead*, L. R. 20 Eq. 282; *Ex parte Plummer*, 1 Atk. 103.

(*c*) *Ex parte Till, Re Mayhew*, L. R. 16 Eq. 97; *Ex parte Eatough, Re Cliffe*, 42 L. T. N. S. 95.

(*d*) *Ex parte Descharmes*, 1 Atk. 103; *Gethin* v. *Wilks*, 2 Dowl. Rep. 189; *Ex parte Plummer, supra; Bradyll* v. *Ball*, 1 Bro. C. C. 427; *Buckley* v. *Taylor*, 2 T. R. 600; *Ex parte Devine*, Cooke, 216.

(*e*) *Ex parte Shuttleworth, Re Dean*, 1 D. & C. 223; Baldwin on Bankruptcy, 4th ed. p. 227.

On the 5th September, 1881, a tenant holding a lease for twenty-one years filed his petition for liquidation. On the 13th September the landlord distrained for a year's rent due, according to the terms of the lease, upon the 24th March, 1881. Trustees in the debtor's liquidation were appointed on the 13th October, 1881, and on the 25th October the landlord distrained for a further six months' rent, due on the 29th September. On the 14th November the trustees of the liquidation disclaimed the lease pursuant to leave granted by the Court. It was held that the landlord, having levied his distress for rent after the commencement of the bankruptcy, could only distrain for one year, according to the 34th section of the Bankruptcy Act, 1869, and that the second distress was therefore invalid (*f*).

The payment due to a gas company for gas supplied, though it is called "rent" in some Acts of Parliament, is not really of the nature of rent, and consequently a gas company does not come within the words "other person to whom any rent is due" in sect. 34 of the Bankruptcy Act, 1869. Those words apply only to a person who, though he is not the landlord of the bankrupt, fills a position analogous to that of a landlord, because he is entitled to receive that which is rent strictly so called (*g*). But not so a gas company, whose special Act provided that "all sums of money due to the company for the supply of gas might be levied by distress, and that any justice, on application, might inquire into and ascertain the amount due, and issue his warrant accordingly for levying the same" (*h*).

A landlord's right of distress is only limited as regards

(*f*) *Ex parte Morrish-Dyke, In re Morrish*, 47 L. T. N. S. 26.

(*g*) *Ex parte Harrison, In re Peake*, L. R. 13 Q. B. D. 753. See also *Ex parte Birmingham Gas Light and Coke Co., In re Adams*, L. R. 11 Eq. 204; and *Ex parte Birmingham and Staffordshire Gas Co., Re Fanshaw*, 11 Eq. 615.

(*h*) *Ex parte Hill, Re Roberts*, L. R. 6 Ch. D. 63, distinguished from *Ex parte Birmingham Gas Co., supra*, in *Ex parte Harrison, supra*.

Part I. Chap. IV.

the goods and effects of the *bankrupt*. Thus, where the tenant of a mill mortgaged certain machinery, &c. to the defendant, who subsequently took possession, and the tenant afterwards became bankrupt, owing his landlord rent for the mill; it was held that the landlord had a right to distrain for six years' arrears, as the goods *had ceased to be the bankrupt's goods*, and that the goods of the defendant which were on the premises could also be distrained (*i*).

Upon the construction of sects. 42 and 142 of the above Act of 1883, an order obtained in the Chancery Division by a creditor for administration of a deceased debtor's estate, not followed by any proceedings in bankruptcy, is not equivalent to or included in the term "order of adjudication," so as to limit the power of the landlord or other person to whom rent is due from the deceased person's estate to recover by distress one year's rent only accrued due prior to the date of the administration order (*j*). The words "order for adjudication" mean an order made by the bankruptcy court, and not orders made by the High Court.

The rent reserved must be a real one.

A distress under an attornment clause in a mortgage will be protected under this section, unless either from the excessiveness of the rent reserved, or from other circum-

(*i*) *Brocklehurst* v. *Lawe*, 7 Ell. & Bl. 176. Payment to a landlord by a tenant of a year's rent, under a threat of distress, even after an act of bankruptcy, is unimpeachable. *Stevenson* v. *Wood*, 5 Esp. 200. A stranger who pays out the distress is entitled to be recouped out of the estate in priority to the other creditors. *Ex parte Kennard*, 21 L. T. N. S. 684. But a sheriff, under an execution after bankruptcy, is not justified in paying to the landlord, with notice of the bankruptcy, a year's rent, no distress having been made. *Lee* v. *Lopes*, 15 East, 230. Compare *Ex parte Elliott*, 3 M. & A. 664, where a distress had been made; and also *Mavor* v. *Croome*, 1 Bing. 261; and *Darnton* v. *Pigman*, Peake, Ad. Ca. 111; Baldwin on Bankruptcy, 4th ed. p. 226, note (3).

(*j*) *In re Fryman's Estate*, 38 Ch. Div. 468.

stances, the Court comes to the conclusion that the rent was a mere sham rent, and that there was no intention to create the real relationship of landlord and tenant, but that the clause was a mere device for the purpose of giving the mortgagee an additional security upon chattels which would otherwise have been distributed amongst his creditors. Thus, where a mortgage deed contained a covenant by the mortgagee that he would not require payment of the principal for a period of five years if the interest was punctually paid, and if the mortgagor should not have become bankrupt, or filed a liquidation petition, or parted with possession of his mortgaged premises, or ceased to carry on his business thereon, and the mortgagor attorned tenant from year to year to the mortgagee in respect of the mortgaged premises, at a rent which was *nearly seven times* the letting value of the premises (the deed not being registered under the Bills of Sale Act), and a few months after the execution the mortgagor filed a liquidation petition, and the mortgagee sought to distrain for a year's rent under the 34th section of the Bankruptcy Act, 1869; it was held that the arrangement was void as against the trustee in liquidation, being a mere device to give the mortgagee the benefit of the 34th section of that Act in the event of the mortgagor's bankruptcy (*k*). But where a mortgage was executed by a company to their bankers to secure the balance of an account current, for the sum of 50,000*l.*, and under the attornment clause the company agreed to become tenants from year to year to the mortgagees at the annual rent of 5,000*l.*; it was held that there was nothing unreasonable in the sum so reserved as a rent (*l*). And in such a case, in the absence of any provision to the contrary, the balance, after the payment of

(*k*) *Ex parte Williams, Re Thompson*, L. R. 7 Ch. D. 138; and see *Ex parte Jackson, Re Bowes*, L. R. 14 Ch. D. 725, where the rent was more than *fifty times* the real value of the property.

(*l*) *Re Stockton Iron Furnace Co.*, L. R. 10 Ch. D. 335.

Part I. Chap. IV.

the interest then due, is applicable in reduction of the principal debt (*m*). And the mortgagee can distrain upon the goods of a third person (who has no notice of the mortgage) which may be upon the mortgaged premises at the time of default in payment of rent by the mortgagor (*n*). And where a debtor mortgages certain premises, and there is an attornment clause in the deed creating a valid rent, and he subsequently by deed mortgages the same premises (subject to the prior mortgage) with other property to another person, and that deed also contains an attornment clause at a valid rent, each mortgagee may distrain for the amount of interest owing to him, and such distresses are valid as against the trustee in liquidation (*o*).

Uncertainty in the amount of rent.

Uncertainty in the amount of the rent does not necessarily render the attornment clause void. Thus, where there was a mortgage to a building society, to secure the repayment of 7,000*l.*, in respect of shares held by the mortgagor in the society, and the deed contained a clause by which it was agreed that if the mortgagee should become entitled to enter, and the mortgagor should then be in occupation of the premises, he should during such occupation be tenant thereof from month to month to the mortgagee at a monthly rent "of such a sum as should be equal in amount to the moneys that ought to be paid monthly by the mortgagor from time to time for subscriptions, interest, fines, and other payments under the rules of the society, and that such tenancy should commence upon the day up to which the said mortgagor should have fully paid up all subscriptions, fines, and other moneys;" it was held that the attornment clause, and the distresses levied under it, were valid as against

(*m*) *Ex parte Harrison, Re Betts*, L. R. 18 Ch. D. 127.

(*n*) *Kearsley* v. *Philips*, L. R. 11 Q. B. D. 621.

(*o*) *Ex parte Punnett, Re Kitchen*, L. R. 16 Ch. D. 226; *Morton* v. *Woods*, L. R. 4 Q. B. 293.

the trustees in bankruptcy (*p*); Brett, L. J., observing "that the real question was this; at the time when the contract was made was it made for the purpose of its being acted upon between the parties, whether there should be a bankruptcy or not; or were their minds really fixed upon this, that it was to be acted upon *only* if there was a bankruptcy? that is to say, they must have had bankruptcy in their contemplation at the time of making the contract; they must have contemplated evading, or attempting to evade, the fair distribution of the property in case of a bankruptcy; that seems to me the true principle of law which was laid down in the case of *Ex parte Williams, Re Thompson*" (*q*).

The relation of landlord and tenant exists although there is a proviso that the mortgagee, at any time after the date fixed for the repayment of the mortgage money, may enter and determine the tenancy without any previous notice (*r*).

A landlord who has elected to take his remedy by proof in the first case will not be allowed to distrain afterwards (*s*).

If the distress is paid out by a third person, he is entitled to have the amount refunded out of the estate before the other creditors receive any dividend (*t*).

A distress for rent in arrear is not an "execution or legal process" within the meaning of sect. 42 (*u*); and, therefore, an injunction will not lie to restrain a gas company, empowered by its act of incorporation to recover rent and charges due for gas supplied "by the same means as landlords may recover rent in arrear," from distraining

(*p*) *Ex parte Voisey, Re Knight*, L. R. 21 Ch. D. 442.

(*q*) *Supra*, p. 97.

(*r*) *Ex parte Queen's Benefit Building Society, Re Threlfall*, L. R. 16 Ch. D. 274. See also *Staveley* v. *Grundy*, L. R. 22 Ch. D. 478.

(*s*) *Ex parte Grove*, 1 Atk. 104.

(*t*) *Ex parte Kennard*, 21 L. T. N. S. 684.

(*u*) Bankruptcy Act, 1883.

Part I. Chap. IV.

upon the goods of a debtor, notwithstanding it had received notice of the bankruptcy proceedings (*v*).

Goods rightfully in the custody of the law, *i.e.*, under a distress, are not considered in the "order or disposition" of the bankrupt within the meaning of the Bankruptcy Act, 1883 (*x*). But there is no sufficient change of possession where goods distrained for rent by a landlord are allowed by him to remain in the custody of the bankrupt tenant's wife (*y*).

Bills of Sale Act, 1878.

Sect. 6 of the Bills of Sale Act, 1878 (*z*), provides, that "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved, or made payable, as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of that Act, of any personal chattels which may be seized or taken under such power of distress: provided that nothing in that section shall extend to any mortgage of any estate, or interest in any land, tenement, or hereditament, which the mortgagee, being in possession, shall have demised to the mortgagor, as his tenant, at a fair and reasonable rent" (*a*).

(*v*) *Ex parte Birmingham Gas Light Co., Re Fanshaw, supra*, p. 95. But see the remarks of Baggallay, L. J., on this case in *Ex parte Harrison, In re Peake, supra*, p. 95; *Ex parte Cockrane, Re Mead, supra*, p. 94; *Ex parte Hill, Re Roberts, supra*, p. 95.

(*x*) Sect. 44, sub-s. 2 (iii); *Sacker* v. *Chidley*, 13 W. R. 690; *Ex parte Foss*, 2 De G. & J. 230; *Taylor* v. *Eckersley*, L. R. 5 Ch. D. 740.

(*y*) *Ex parte Shuttleworth, Re Deane*, 1 D. & C. 223.

(*z*) 41 & 42 Vict. c. 31.

(*a*) *Ex parte Jackson, Re Bowes, supra*, p. 97; *Ex parte Williams, Re Thompson, supra*, p. 97; *In re Stockton Iron Furnace Co., supra*, p. 97; *Morton* v. *Woods, supra*, p. 98; *Ex parte Voisey, Re Knight, supra*, p. 99. As to what documents are included in the expression "bill of sale," see Baldwin on Bankruptcy, 4th ed. p. 198.

It has been held that an attornment clause in a mortgage of land whereby, by reason of the relation of landlord and tenant thereby created, a power of distress is given to the mortgagee as security for the payment of interest in arrear, is a bill of sale within the above section, and that the proviso applies only to cases in which the mortgagee, having previously taken possession of the mortgaged premises, has demised to the mortgagor, and not to a case where the demise is created by the mortgage deed itself (*b*). So, also, an agreement for the letting of a public-house, whereby the tenant agreed not to sell any malt liquors other than such as should be purchased of the landlord, containing a proviso that if during the tenancy any sums should remain unpaid for the space of twenty-four hours after a demand in writing for payment thereof had been left upon the premises, it should be lawful for the landlord to enter and distrain in respect of the amount due, was held to require registration as a bill of sale (*c*).

A power of distress in an agreement for hire and purchase of railway waggons is not void as against the policy of the bankruptcy laws (*d*).

Second distress.

Where a landlord distrained for rent before the bankruptcy of his tenant, and when the goods were appraised left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in prison, and after the bankruptcy distrained for the same amount of rent, it was held that the second distress was void (*e*). And where a landlord put in a distress for arrears of rent due from a tenant who had committed an act of bankruptcy, but in consequence of a notice from the petitioning creditor,

(*b*) *Re Willis, Ex parte Kennedy* v. *D'Eresby*, L. R. 21 Q. B. D. 384; 5 L. T. N. S. 749; *Hall* v. *Comfort*, 18 Q. B. D. 11; *Ex parte Jackson*, 14 Ch. Div. 725, 733.

(*c*) *Pulbrook* v. *Ashby*, 56 L. J. Q. B. 376.

(*d*) *Leman* v. *Yorkshire Waggon Co.*, 29 W. R. 466.

(*e*) *Ex parte Bradley*, 1 Dea. & Chit. 223.

Part I. Chap. IV.

stating that he was proceeding against the tenant in bankruptcy, and requiring the auctioneer not to sell, threatening to hold him accountable if he did, the landlord withdrew the distress without obtaining payment, and at the time no adjudication of bankruptcy had been made, nor had any assignee been appointed; it was held that the landlord was not justified in afterwards distraining a second time on the same goods to satisfy his claim for the same arrears of rent (*f*). On the 5th September, 1881, a tenant holding a lease for twenty-one years filed his petition for liquidation. On the 13th September the landlord distrained for a year's rent, due, according to the terms of the lease, upon the 24th of March, 1881. Trustees in the debtor's liquidation were appointed on the 13th October, 1881, and on the 25th October the landlord distrained for a further six months' rent due on the 29th September. On the 14th November the trustees of the liquidation disclaimed the lease pursuant to leave granted by the Court. It was held that the landlord, having levied his distress for rent after the commencement of the bankruptcy, could only distrain for one year according to the 34th section of the Bankruptcy Act, 1869, and that the second distress was therefore invalid (*g*).

An undertaking given by the solicitor of the trustee of a bankrupt tenant will frequently make such solicitor personally liable. Thus, where a distress had been put in upon the lands of a bankrupt tenant by the landlord, and the solicitor to the assignees undertook to pay the landlord his rent, provided it did not exceed the value of the effects distrained, he was held liable (*h*).

After notice of an act of bankruptcy, a broker engaged

(*f*) *Bagge* v. *Mawby*, 8 Exch. 641. But if violence is used, and not a mere threat, such second distress would be lawful. *Lee* v. *Cooke*, 3 H. & N. 203.

(*g*) *Ex parte Morrish Dyke, In re Morrish*, 47 L. T. N. S. 26.

(*h*) *Burrell* v. *Jones*, 3 B. & A. 47.

by the landlord distrained for rent. The assignees in bankruptcy, who were in possession, placed an auctioneer in possession, who paid the broker the arrears of rent on his agreeing to give up one quarter's rent; it was held that so much of the money as exceeded a year's rent was not money received to the use of the assignees of the tenant, as those facts did not show a sale of the goods (*i*).

A landlord's claim to rent is not discharged by the tenant's subsequently becoming bankrupt, and obtaining his certificate (*k*). But arrears of poor rates due from a bankrupt, before his bankruptcy, are proveable under the fiat; and the certificate is a bar to the levying of the amount by distress and sale of his subsequently-acquired goods (*l*).

Where an underlessee pays rent to his landlord, who fails to pay his superior landlord, and the superior landlord distrains and sells the underlessee's goods at a disadvantage, the assignees in bankruptcy of the underlessee may sue for the damage incurred by such sale (*m*).

Where the assignees of a bankrupt gave to the bankrupt an authority in writing to receive the arrears of rent due on certain premises of his; it was held that such authority did not imply a power to distrain for such rents (*n*).

With regard to the winding-up of companies, the right

(*i*) *Lackington* v. *Elliott*, 7 M. & G. 538; *Paull* v. *Best*, 3 B. & S. 537. If a constable becomes a bankrupt when possessed of goods which he has levied under a distress for rent due to the landlord, the landlord has a lien upon such goods; but if they are sold and converted into money, he has no lien upon them, but must come in as a creditor *pro rata*. *Ex parte Dobson*, 7 Vin. Abr. 74.

(*k*) *Newton* v. *Scott*, 10 M. & W. 471; *Phillips* v. *Shervil*, 6 Q. B. 944; *Briggs* v. *Sowry*, 8 M. & W. 729.

(*l*) *In re Weatherall and Courthope*, 19 L. J. M. C. 115.

(*m*) *Hancock* v. *Caffyn*, 1 L. J. C. P. 104.

(*n*) *Ward* v. *Shew*, 2 L. J. C. P. 58.

(c) On the

Part I. Chap. IV.

winding-up of companies.

to distrain is affected by sects. 85, 87, and 163 of the Companies Act, 1862 (*o*).

The 163rd section provides that, "Where any company is being wound up by the Court, or subject to the supervision of the Court, any attachmment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents."

But this section is to be read with, and is controlled by, the 85th and 87th sections (*p*).

By the 85th section, "The Court may at any time after a presentation of a petition for winding-up a company under that Act, and before making an order for winding-up the company, upon the application of the company, or of any creditor or contributory of the company, restrain further proceedings in any action, suit, or proceeding, against the company, upon such terms as the Court thinks fit; the Court may also at any time after the presentation of such petition, and before the first appointment of liquidators, appoint provisionally an official liquidator of the estate and effects of the company."

And by sect. 87 it is enacted, that "when an order has been made for winding-up a company under this Act, no suit, action, *or other proceeding* shall be proceeded with or commenced against the company, except with the leave of the Court, and subject to such terms as the Court may impose."

In order to obtain leave under this section a landlord must show that there are special circumstances which render it inequitable that sect. 163 should be enforced against him, or that under the circumstances the rent ought to be treated as a part of the costs of the winding-up (*q*).

(*o*) 25 & 26 Vict. c. 89.

(*p*) See, however, as to this, the judgments of Jessel, M.R., in *Traders' North Staffordshire Carrying Co.*, L. R. 19 Eq. 60; and in *Universal Disinfector Co.*, L. R. 20 Eq. 162. And see also Buckley on Companies, 4th ed. p. 207.

(*q*) *Re Lancashire Cotton Spinning Co., Ex parte Carnelley*, 35 Ch. D. 656.

As we have seen before (*r*), the 10th section of the Judicature Act, 1875, does not so far assimilate the rules of the winding-up of companies to the rules in bankruptcy as to give the collector of the Queen's taxes a right to distrain on the goods of a company in liquidation (*s*).

A distress for rent by a landlord upon the goods of a company in liquidation is not void under sect. 163 of the Companies Act, but it is subject to the discretion of the Court by virtue of the 85th and 87th sections; and in exercising such discretion the Court seems to have laid down the rule that for rent accrued due *before* the winding-up, which is proveable against a company's assets, no distress will be allowed; but that for rent accrued due *after* the winding-up, in respect of premises *retained for the convenience of the winding-up*, distress *will* be allowed (*t*). Thus, in the case of *Thomas* v. *Patent Lionite Co.* (*u*), after an extraordinary resolution for the voluntary winding-up of a company had been passed, but before a liquidator had been appointed, a landlord distrained for rent due from the company before the resolution was proved. Immediately afterwards an action was commenced on behalf of the debenture holders of the company, in whose favour the company had made a mortgage of its assets, and the company moved for and obtained in that action an order to restrain the landlord from proceeding with his distress. A receiver appointed in the action thereupon took possession of the chattels distrained, and by arrangement a sum of money was set apart to meet the claim of the landlord, if the Court should hold him entitled to the benefit of his

(*r*) *Ante*, p. 93, note (*y*).

(*s*) *Re Regent United Service Stores*, L. R. 8 Ch. D. 616; *Re Coal Consumers' Association*, L. R. 4 Ch. D. 625; *In re Bridgwater Engineering Co.*, L. R. 12 Ch. D. 181; *Re Therese & Co.*, W. N. 1879, p. 31; *Westbourne Grove Drapery Co.*, L. R. 5 Ch. D. 248.

(*t*) Buckley on Companies, 4th ed. p. 212.

(*u*) L. R. 17 Ch. D. 250.

distress. Subsequently, an order was made for the compulsory winding-up of the company, which did not refer to the proceedings in the voluntary winding-up: it was held by Jessel, M. R., Brett and Cotton, L.JJ. (reversing the decision of Malins, V.-C., in the Court below), that the distress was avoided by sect. 163 of the Companies Act, 1862, *unless sufficient grounds could be shown for inducing the Court to exercise the discretionary power given by sect.* 87, and that the circumstances of the case did not furnish any such grounds, the case not being one where the landlords *could not prove for rent.* Jessel, M. R., after stating the terms of sect. 163, says: "This would clearly defeat the distress, apart from sects. 85 and 87. Under these sections the Court, notwithstanding sect. 163, has a judicial discretion to allow a landlord to distrain, and ought to do so where the landlord is not a creditor of the company, and cannot prove for his rent. But as a general rule, if he can prove, the Court will not allow him to distrain. Here it is admitted that the landlords are creditors, and can prove for the rent; there is therefore no reason why the Court should allow them to distrain" (*x*).

A voluntary liquidation commences from the date of the resolution, whether a liquidator is appointed at the same time or not (*y*). But, on the other hand, where the rent has accrued *subsequent* to the date of the winding-up, a distress will be allowed *in respect of premises retained for the convenience of the winding-up* (*z*).

This subject was very fully discussed in the case of *In re Oakpits Colliery Co.* (*a*), where Lord Justice Lindley

(*x*) See also *Re Coal Consumers' Association*, L. R. 4 Ch. D. 625; *North Yorkshire Iron Co.*, L. R. 7 Ch. D. 661; *Re Traders' North Staffordshire Carrying Co.*, L. R. 19 Eq. 60; *Re Bridgwater Engineering Co.*, L. R. 12 Ch. D. 181; *Re South Kensington Co-operative Stores, Limited*, L. R. 17 Ch. D. 161.

(*y*) See remarks of Jessel, M. R., in *Thomas* v. *Patent Lionite Co., supra.*

(*z*) *Re North Yorkshire Iron Co., supra.*

(*a*) L. R. 21 Ch. D. 322.

reviews the authorities at some length. In that case E. demised a colliery to a company for twenty-five years from January, 1858. The company mortgaged it by underlease. In 1878, E. and the company made an agreement for a new lease of the colliery and of the mines under 163 acres of adjoining land. The company brought plant and machinery on to the 163 acres, sank pits, and found coal. No new lease was granted. On the 28th of January, 1880, the mortgagees took possession of the colliery, but did not interfere with the 163 acres. On the 31st of January, 1880, a petition to wind up the company was presented, and an order made. The liquidator did not take possession of the colliery or of the 163 acres, nor did he take any steps to give the demised premises up to E.; the plant and machinery remained on the 163 acres. In May, 1880, the liquidator had the whole of the plant, both on the colliery and on the 163 acres, valued, with a view of a sale to the mortgagees, but this was not carried out by the mortgagees. In May, 1881, the liquidator advertised the plant for sale. On the 30th of May, 1881, E. took out a summons for leave to distrain on the plant on the 163 acres, or to have the proceeds paid to him. In June, 1881, the plant was sold, and in January, 1882, an order was made that the liquidator should pay to E. all rent accruing since the commencement of the winding-up: it was held that no case had gone the length of deciding that a landlord was entitled to distrain for, or be paid in full, rent accrued since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property of which the company is lessee; and that the fact that the liquidator left the company's plant where he found them, that he had them valued for sale in May, 1880, and that he took no steps to surrender the company's interest in the colliery and the 163 acres, did not entitle the landlord to distrain, or to be paid in full; and that the summons ought to have been dismissed.

Lindley, L. J., classifies the cases on this subject as follows:—

"*First*, as to rent in arrear at the commencement of the winding-up—

"(1) If the landlord is a legal creditor of the company in respect of rent in arrear at the commencement of the winding-up, he is not allowed to distrain for arrears of rent, but he must prove his debt like any other creditor (*b*).

"(2) Moreover, in cases of this kind, the circumstance that the liquidator has retained possession, and carried on the company's works, has been held not to entitle a landlord or mortgagee (with a power of distress as and for rent) to distrain for rent in arrear in the winding-up (*c*).

"(3) If, however, the landlord is not a legal creditor of the company by reason of the company not being his tenant, he is permitted to distrain for rent in arrear at the commencement of the winding-up (*d*).

"(4) And in such a case he will be allowed to distrain, although the liquidator offers to allow the arrears to be proved as a debt in the winding-up (*e*).

"*Secondly*, as to rent accruing *after* the commencement of the winding-up—

(*b*) *In re Traders' North Staffordshire Carrying Co.*, L. R. 19 Eq. 60; *ante*, p. 106 (where the distress was for tolls in arrear); *In re Coal Consumers' Association*, L. R. 4 Ch. D. 625 (where the liquidator retained possession, but not for any purposes of liquidation); *Thomas* v. *Patent Lionite Co.*, L. R. 17 Ch. D. 250 (a case of voluntary winding-up followed by a compulsory order).

(*c*) *In re North Yorkshire Iron Co.*, L. R. 7 Ch. D. 661; *In re Brown, Bailey & Dixon*, L. R. 18 Ch. D. 649; *In re South Kensington Co-operative Stores*, L. R. 17 Ch. D. 161.

(*d*) *In re Exhall Coal Mining Co.*, 4 De J. & S. 377.

(*e*) *In re Regent United Service Stores*, L. R. 8 Ch. D. 616.

"(1) If the liquidator has retained possession for the purposes of the winding-up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it, or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding-up (*f*).

"(2) But if he has kept possession by arrangement with the landlord, and for his benefit, as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain (*g*).

"When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding-up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose; and in such a case it appears to us that the rent for the whole period during which the property is so retained or used, ought to be paid in full without reference to the amount which could be realized by a distress. This was the view taken by James, L. J., in the case of *Re Lundy Granite Company* (*h*), and by Fry, J., in *Re Brown, Bailey & Dixon* (*i*), and by Kay, J., in the first case."

A limited company mortgaged certain mills, machinery and fixtures belonging to it, to secure 22,000*l.*; the mortgage containing a clause by which the company attorned tenants to the mortgagee at an annual rent of 1,595*l.* The company was ordered to be wound up, but the official

(*f*) *In re Lundy Granite Co.*, L. R. 6 Ch. App. 462; *In re North Yorkshire Iron Co., supra; In re Silkstone Coal Co.*, L. R. 17 Ch. D. 158; *In re South Kensington Co-operative Stores, supra; In re Brown, Bailey & Dixon, supra.*

(*g*) *In re Progress Assurance Co.*, L. R. 9 Eq. 370; *In re Bridgwater Engineering Co., supra.*

(*h*) *Supra.* (*i*) *Supra.*

liquidator remained in possession of the mills for more than a year in order to sell them, if possible, as a going concern, paying the expenses of keeping up the premises and machinery, but without actually working the mills. The mortgagees acquiesced in this arrangement, believing it to be for the benefit of all parties. It was held that the mortgagees ought not to have leave to distrain for a year's rent, accrued since the winding-up order, as the evidence showed that the occupation of the liquidator was for the benefit of the mortgagees as well as of the company (*k*).

Between the dates of the appointment of a provisional liquidator on a winding-up petition, and of a subsequent resolution by the company for a voluntary winding-up, the overseers of a parish proceeded, without the leave of the Court, to distrain for rates which had become due for the current half-year in respect of the company's premises; it was held, on appeal, that as the overseers' right of distress was defeated only by the appointment of the provisional liquidator, the case was one where, if leave to distrain had been applied for, it would have been granted, and that an injunction ought only to have been granted on the terms of the liquidator's paying the rates (*l*).

The same principle guides the Court upon an application made in a winding-up for payment of rates in full, as upon an application for leave to distrain for rent. The true test whether payment of rates in full shall or shall not be ordered is, whether there has been a beneficial enjoyment by the liquidator of the premises of the company (*m*).

We have seen that where the rent is due before the winding-up the lessor cannot distrain; but if he has a right of re-entry, and seeks to exercise it, he may by this

(*k*) *Re Lancashire Cotton Spinning Co., Ex parte Carnelley*, 35 Ch. D. 656.

(*l*) *In re the Dry Docks Corporation of London*, 39 Ch. Div. 306.

(*m*) *Re National Arms and Ammunition Co., Limited, Ex parte Corporation of Birmingham*, 28 Ch. D. 474, following *Re West Hartlepool Colliery Co.*, 34 L. T. N. S. 568, and *Re Watson, Kipling & Co.*, 49 L. T. N. S. 115.

means obtain payment in full of rent due before the winding-up; for if the company resist re-entry, and desire to retain the property, it can do so only upon the terms of complying with the legal obligation to pay the rent (*n*). But if there is no privity between the lessor and the company, the lessor is not a creditor of the company at all, and cannot prove in the winding-up. For the 163rd section of the Companies Act, 1862, does not operate to make void a distress for rent under which the property of a company in the course of being wound up happens to be taken by the landlord, to whom the company *are not tenants*, in exercise of his common-law right to seize any goods which he may find upon the demised premises. Therefore, in such a case, the landlord need not obtain the leave of the Court, under sect. 87 of the Act, to put his distress in force. The 163rd section was only intended to apply to proceedings taken directly against the company by one of their own creditors, and not indirectly to deprive a landlord, between whom and the company no privity exists, of his common-law remedy for the recovery of his rent. And if after the commencement of the winding-up of the company, they, through their liquidator, for the convenience of the winding-up, remain in the occupation of premises of which they are themselves tenants, the landlords ought to be paid in full the rent which becomes due after the commencement of the winding-up (*o*).

So this rule was held not to apply to a case in which the company were not tenants of the landlord (but under-tenants of the lessee), and the landlord had accepted as collateral security for the overdue rent a promissory note of the company upon which he was entitled to prove in the winding-up. In such a case the landlord ought to be allowed to realise his distress (*p*).

(*n*) *Re Silkstone & Dodworth Co., supra*; *Re South Kensington Stores, supra*; *General Share Co.* v. *Wetley Brick Co.*, L. R. 20 Ch. D. 260.

(*o*) *Re Lundy Granite Co., Ex parte Heavan*, L. R. 6 Ch. App. 462.

(*p*) *Re Carriage Co-operative Supply Association, Li-*

Where a company who were the lessees of a house where they carried on their business were ordered to be wound up, being indebted in an arrear of rent to their landlord, and a scheme of reconstruction was sanctioned by the Court under which the lease was purchased by a new company, and the new company agreed with the landlord to pay him the arrears of rent and all subsequent rent accruing due under the lease, but no assignment of the lease to the new company was executed, and the new company issued debentures charging all their property to a much larger amount than the value of the furniture in the house, and the new company was wound up, a year's rent being due to the landlord; it was held that as the charge of the debenture holders was more than the value of the furniture, the furniture did not belong to the company, and the landlord was therefore entitled to distrain upon it (*q*).

Where by a deed lands were demised to a company for twenty-one years at a rent, and there was a proviso that "if the rents should become in arrear for twenty-one days the lessors might re-enter and sell, and further, that if the lessees became bankrupt the lessors might enter," but there was nothing to limit the power of distress to that conferred by the lease, and rent being in arrear, the lessors levied two distresses, one of which was *not within the twenty-one days* mentioned in the proviso; it was held that if a lessor exercises his *express* right and his *legal* right simultaneously, but before the *express* right is exercisable in respect of a portion of the amount for which the distress is put in, he will be entitled to marshall the property seized, so as to cast the debt, in respect of which he exercises the common-law right in the first instance, upon the goods properly seizable under that right. Pearson, J., here observes: "Where there is in the deed a power of distress, which is in the same terms, practically, as would be used

mited, Ex parte Clemence, L. R. 23 Ch. D. 154.

(*q*) *Re New City Constitutional Club Co., Ex parte Pursell,* 34 Ch. D. 646.

if you put into writing the common-law power, then, notwithstanding that the power of distress does not arise until a month or twenty-one days, or any other time, after the rent has become due, the lessor may distrain as soon as the rent has become due" (*r*).

A mortgagee with an attornment clause applying for leave to distrain is not in as favourable a position as a landlord (*s*).

(*r*) *Re River Swale Brick and Tile Co., Limited*, 48 L. T. N. S. 778.

(*s*) *Re Lancashire Cotton Spinning Co., Ex parte Carnelley*, 35 Ch. D. 656.

CHAPTER V.

WHAT MAY OR MAY NOT BE DISTRAINED.

Distrainor must look to the land, and not to the person of the lessee.

It is a fundamental rule with regard to distress, that it is to the land itself that the distrainor must look, and not to the person of the lessee, or the person of the grantor of the rent; for his claim is not in respect of the person in possession of the premises, or owning the effects found there, but in respect of the premises alone (*a*). It may also be mentioned that when goods are distrained for rent no property, special or otherwise, is acquired by the party distraining or seizing (*b*), but they remain in *custodiâ legis* until sold, or otherwise lawfully disposed of, and in the meantime the property of the original owner remains unaltered (*c*). And it may also be considered as a general rule that all goods found upon the premises (subject to certain exceptions which we shall treat of hereafter) are liable to be distrained by the landlord for rent, whether such goods belong to the tenant or to other persons. It does not matter in whose possession the premises are at the time of the distress, whether in that of the original lessee, or of his assignee, or under-tenant, or heir, or devisee, or executor, or whether held in severalty, coparcenary, joint tenancy, or in common (*d*). This rule was originally founded on necessity, it being considered that otherwise the rights of the landlord would be liable to

Immaterial in whose possession the premises are at the time of the distress.

(*a*) Bullen, 79.

(*b*) 2 Saund. by Wms. & Pat. 47, n. (*c*).

(*c*) Stephen's Com. vol. II. 7th ed. p. 11.

(*d*) *Saffery* v. *Elgood*, 1 A. & E. 191; *Braithwaite* v. *Cooksey*, 1 H. Black. 465; *Bolton* v. *Canham*, Pollexf. 120; *Iremonger* v. *Newsom*, Latch. 261; 1 Roll. Abr. 671; Bullen, 80; *Jusan* v. *Dixon*, 1 M. & S. 601.

be defeated by fraudulent collusion, if he were restricted in his remedy of distress to the goods of his tenant alone (*e*).

But a landlord cannot distrain on the goods of a third person brought by himself on to the demised premises without the authority of the third person, even though the goods had originally been placed on the premises by the authority of the third person and wrongfully removed by somebody else (*f*).

It will thus be seen that it is not so much necessary to consider what goods can be distrained, as what may not; for the law has in various instances taken care to protect certain classes of property whilst on the premises of the tenant, in its anxiety to guard the interests of the community at large in commercial and other transactions of a like nature. But there are certain cases in which exceptions to these general rules arise, not out of the place and circumstances in which the goods are found, but out of the ownership of property which the holders of them possess.

In our preceding chapters (*g*) we have fully discussed the rights of distress with regard to individuals possessed of estates, and therefore it only remains for us to examine a few peculiar cases in which an exemption arises from the *status* of the parties whose goods are so distrained.

(1) Persons exempted from distress.

And first, no distress for rent can be made on land in the possession of a person holding by title paramount to the distress. Thus, as we have seen (*h*), if a tenant be evicted by title paramount, but remains in possession under a new agreement with the person who had evicted him, the rent itself becomes extinguished, and his original landlord cannot distrain on him for rent (*i*). And so the goods of a lessee, under a lease made antecedent to the

(a) Persons holding by title paramount.

(*e*) Bradby 73.
(*f*) *Paton* v. *Carter*, 1 C. & E. 183.
(*g*) *Ante*, Chaps. III., IV.
(*h*) *Ante*, p. 37.
(*i*) *Hopcraft* v. *Keys*, 9 Bing. 613.

Part I. Chap. V.

grant of a rent-charge, cannot be taken, because he has an interest paramount to the charge (*k*).

(b) Copyholders.

A copyholder, also, from the nature of his interest, cannot be distrained upon for a rent-charge imposed by the lord, the copyholder being in by an independent right (*l*).

(c) Joint tenants.

The cattle of a joint tenant also cannot be distrained for a rent-charge granted by his companions, because they are lawfully on the land by an independent right (*l*).

(d) Strangers.

But where a stranger claims under the grantor after the grant of a rent-charge, his cattle are liable to distress; as the cattle of a lessee, where the demise was after the grant (*m*). The stranger, in order to exempt himself, must show that he holds by some paramount title. So where the defendants distrained for arrears of a rent-charge granted by a tenant for sixty-two years, for three lives, and the tenant assigned over to the plaintiffs; it was held that the assignee of the grantor of the rent-charge was considered to be in the position of a tenant, and that as he could not claim by title paramount his goods were liable to be distrained (*n*).

(e) Under-tenants.

The right of distress extends to the goods of a person holding as under-tenant; for his occupation is considered, with respect to the lessor, as the possession of his lessee (*o*). Formerly, at common law, it was necessary that a lease should be completely surrendered before it could be renewed; and the under-tenants often refused to surrender their leases. This was remedied by the statute 4 Geo. II. c. 28, s. 6, which provided, that "the renewal of the prin-

4 Geo. 2, c. 28, s. 6.

(*k*) *Saffery* v. *Elgood*, 1 Ad. & Ell. 191.

(*l*) *Ibid.*

(*m*) Com. Dig. tit. Distress (B), 2.

(*n*) *Saffery* v. *Elgood*, *supra*; Bullen, 81. As to distress in cases of joint tenants, coparceners, co-heirs in gavelkind, and annuitants, see *ante*, pp. 45—50, and 66.

(*o*) *Bull* v. *Gibbs*, 8 T. R. 327; *Arnsby* v. *Woodward*, 6 B. & C. 519.

cipal lease should be valid without a surrender of the underlease, and that the owners of the new lease should be invested with the same right to the rent of under-tenants, and the same remedy for recovery thereof, as if the original leases had been kept on foot" (*p*).

(f) The Crown.

As it would be inconsistent with the dignity of the Crown that it should be treated as a wrongdoer, it is a rule, that no man can distrain upon lands in its possession (*q*). But though the grantee of the rent cannot distrain upon the possession of the Crown, yet, if he grant over the land, the rent may then be distrained for, as it is not extinguished, but only suspended by the possession of the Crown, and when that possession ceases the remedy revives (*r*). This, however, only applies in the case of a rent-service, where the Crown enters without office or record, for, where it is entitled by such office or record, no distress can be made, either on the Crown's possession, or on that of its grantee. In the case of a rent-charge, however, if the Crown is entitled by office found out of the land out of which it issues, although the grantee of the rent cannot distrain on the possession of the Crown, yet if the Crown grant over the land, then the rent and all arrears may be distrained for (*s*). But if the rent-charge as well as the land is found by the office, the remedy of distress will be absolutely gone (*t*).

Where claims of the Crown and of a subject as creditors come into competition, the prerogative right of the Crown to priority is not limited to proceedings by writ of extent, but equally attaches in proceedings by distress, although the distress put in by the Crown be subsequent in date to

(*p*) See also 8 & 9 Vict. c. 106, s. 9. As to cases where the under-tenant is compelled to pay rent owing by his mesne landlord to the superior landlord, see *post*, p. 174.

(*q*) Bro. Dist. pl. 46, 47; Chitty's Prerog. 281, 376.

(*r*) Bro. Dist. pl. 27; Anon. Saville, 125.

(*s*) Bro. Prerog. pl. 120; Bro. Dist. pl. 27; 1 Leon. 191; Bullen, 83.

(*t*) Bro. entre, congeable, pl. 125.

Part I. Chap. V.

that of the subject, provided the distress put in by the subject has not been completely executed by actual sale (*u*).

(g) Ambassadors.

The rights and privileges of ambassadors, and their servants, have been considered to be of such importance, that they should be kept sacred and inviolate. By the statute 7 Anne, c. 12, s. 3, it is provided, that "All writs and processes that shall at any time hereafter be sued forth, or prosecuted, whereby the person of any ambassador, or other public minister, of any foreign prince or state, authorized and received as such by her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever." And by sect. 6, "No person shall be proceeded against as having arrested the servant of an ambassador or public minister by virtue of this Act, unless the name of such servant be first registered," as in the Act mentioned.

7 Anne, c. 12, s. 3.

Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings; it was held that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates (*x*).

(h) Distress on possession limited by statute.

In cases where a remedy by distress is given by statute to persons who were not entitled to it by common law, as to executors and administrators by the statute 32 Hen. VIII. c. 37 (*y*), or by the statute 8 Anne, c. 14, the exercise of the remedy must be strictly limited to the remedy mentioned in such statutes.

(*u*) *Attorney-General* v. *Leonard*, 38 Ch. Div. 622.

(*x*) *Novello* v. *Toogood*, 1 B. & C. 554, discussed in *Parkinson* v. *Potter*, 16 Q. B. D. at p. 161.

(*y*) *Ante*, p. 57.

We will now proceed to discuss the several cases in which goods found upon the demised premises are protected from distress. Such protection militates both ways; for in some cases a protection is afforded them by common law, whilst in others, goods previously exempted are made liable to distress by particular statutes. The divisions on this subject, laid down in the leading case of *Simpson* v. *Hartopp* (*z*), are as follows :—

Simpson v. *Hartopp.*

I. *Things absolutely privileged* at common law, including—
(1) Things annexed to the freehold.
(2) Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ.
(3) Cocks and sheaves of corn, and other things which cannot be restored in the same plight.
(4) Things in actual use.
(5) Animals *feræ naturæ*.
(6) Things in the custody of the law (*a*).
(7) Wearing apparel, bedding, and tools of trade, to value of 5*l*.

II. *Things conditionally privileged*, including—
(1) Beasts of the plough and instruments of husbandry.
(2) The instruments of a man's trade or profession.

These divisions we shall now consider in the above order, and then proceed to examine the recent protection which has been given to the goods of a lodger, under the provisions of the statute 34 & 35 Vict. c. 79 (the Lodgers' Goods Protection Act, 1871); and the protection afforded to railway rolling stock, and to gas meters by their respective statutes; as also to the wearing apparel, bedding, and tools of a man's trade to the value of 5*l*. by the Law of Distress Amendment Act, 1888.

(*z*) 1 Sm. L. Cas. 8th ed. p. 456.

(*a*) The above numbers (5) and (6), are not deduced from *Simpson* v. *Hartopp*, *supra*, but will be found in the notes therein. 1 Sm. L. Cas. 8th ed. pp. 456 *et seq.*

Part I. Chap. V.

I. Things absolutely privileged at common law.

(1) Things annexed to the freehold.

Whatever is annexed to the freehold, such as buildings, fixtures, furnaces, windows, doors, and the like, constitute for the time being part of the freehold, and are absolutely exempt from distress (*b*) ; and the reason for this seems to be that they are not personal chattels, but form part of the thing demised; also, that they cannot be taken away without doing damage to the freehold, and the things themselves would be injured by their severance, and could not be restored in as good condition as when taken (*c*).

This exception extends not only to all such things belonging to the heir, which the tenant will not be permitted to remove from off the premises, but also to fixtures, which, as between landlord and tenant, *would* be removable. In this latter respect, there is a distinction between *distresses* and *executions;* for under executions, fixtures, which the party against whom the execution issues could have removed as against his own immediate landlord, may be seized (*d*).

Fixtures forming part of the thing demised.

And first, they cannot be distrained because they form part of the thing demised. Thus, in the case of *Niblet* v. *Smith* (*e*), it was held that a lime-kiln affixed to the freehold could not be distrained, it being considered not a mere personal chattel, but part of the freehold. So also keys (*f*), gas fittings (*g*), windows, and charters (concerning the realty), being by construction of law parcel of the

(*b*) *Simpson* v. *Hartopp*, *supra.*

(*c*) Gilbert on Distress, 4th ed. p. 39; Bullen, 92. At common law, a distress being a mere pledge, nothing could be distrained which could not be returned in the same plight. For this, see *post*, p. 137.

(*d*) *Poole's case*, 3 B. & C. 368; *Place* v. *Fagg*, 4 M. & R. 277; *Bates* v. *Duke of Beaufort*, 8 Jurist, N. S. 270, L. J.; Sm. L. & T. 3rd ed. p. 213. Unless the tenant has by his lease or agreement renounced his right to disannex or remove them during the term. *Dumergue* v. *Rumsey*, 2 H. & C. 777.

(*e*) 4 T. R. 504.

(*f*) 11 Co. Rep. 50; 6 Exch. 311; *Gauntlett* v. *King*, 3 C.B. N. S. 59.

(*g*) *Gas Light and Coke Co.* v. *Hardy*, 17 Q. B. D. 619; *Gas Light & Coke Co.* v. *Herbert Smith & Co.*, 3 Times Law Rep. 15.

freehold, are not liable to be distrained (*h*); and fixtures, such as a grate, a kitchen range, or a copper, affixed to the dwelling-house, are not distrainable, though they may be removed by the tenant during the term (*i*). A mere temporary removal of fixtures for the purposes of necessity is not sufficient to destroy this privilege (*k*). Thus, a smith's anvil on which he works is not distrainable, for it is accounted part of the forge, though it be not actually fixed by nails to the shop (*k*). So a mill-stone is not distrainable, though it be removed out of its proper place in order to be picked; because such removal is of necessity, and the stone still continues to be part of the mill (*l*). But mules used for spinning cotton, which were fixed by means of screws, some into the wooden floors of a cotton mill, and some by being sunk into the stone flooring and secured by molten lead, were held to be distrainable for rent; and the reason of this seems to have been that they were fixed to the freehold, not for the improvement of the land, but only for the purpose of being more conveniently used as machinery. In the case which decided this, Parke, B., says, "they (*i.e.* the machinery) are not of a perishable nature, and would not suffer by a careful removal. If it were necessary to take some to pieces in order to remove them, that circumstance would make no difference; for that might occur in other chattels, as for instance, post-beds; they could not be carried to the pound without being first taken to pieces, and the distrainee would have no reason to complain that they were restored to him in the disjointed state at the pound, where he must attend to rescue them. It is a question of fact, depending on the circumstances of each case, and

(*h*) Gilbert on Distress, 34, 48; *Hellawell* v. *Eastwood*, 6 Exch. 295.

(*i*) *Darby* v. *Harris*, 1 Q. B. 895.

(*k*) *Gorton* v. *Falkner*, 4 T. R. 567.

(*l*) Bro. Abr. tit. Distress, pl. 23; Amos & F. 2nd ed. 317; Woodfall's L. & T. 10th ed. 396.

Part I. Chap. V.

principally upon two considerations, first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed 'integræ, salvæ, et commodæ' or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the *permanent and substantial improvement of the dwelling*, or *merely for a temporary purpose*, or the more complete enjoyment and use of it *as a chattel*" (*m*).

Machinery annexed to the soil for the purpose of rendering minerals merchantable, if such machinery was capable of being removed therefrom by disturbing the soil without destroying the land, cannot be deemed to be so attached to the land as to become part of it, and belong to the owner of the land, but are deemed to be trade fixtures (*n*).

What degree of annexation is necessary.

It will be seen, therefore, from this case, that the question of the right to distrain on articles of this nature depends upon the degree of annexation which is necessary in order to bring them within the category of a fixture. Thus it has been held that a granary, resting by its mere weight upon staddles built into the land, was not a fixture within the meaning of the deed by which all the fixtures appertaining to a farm were conveyed (*o*). On the other hand, rails and sleepers, forming a railway used for the purpose of working a colliery, which are laid upon a level

(*m*) *Hellawell* v. *Eastwood*, 6 Exch. 295; *Waterfall* v. *Penistone*, 6 E. & B. 876, distinguished in *Walmsley* v. *Milne*, 7 C. B. N. S. 115; and *Longbottom* v. *Berry*, L. R. 5 Q. B. 123, approved and followed in *Sheffield and South Yorkshire Permanent Building Society* v. *Harrison*, L. R. 15 Q. B. D. 358. In *Duck* v. *Braddyll*, 13 Price, 455, it was doubted whether machinery bolted to the floor of a factory was distrainable; and in *Trappes* v. *Harter*, 2 Cr. & M. 177, the screwing of a stocking frame to the floor, to keep it steady, did not make it a fixture. And see the *Lincolnshire Finance Co.* v. *Farrant*, 2 Times Law Rep. 248.

(*n*) *Ward* v. *Countess of Dudley*, 57 L. T. N. S. 20, following *Wake* v. *Hall*, L. R. 8 App. Cas. 195.

(*o*) *Wiltshear* v. *Cottrell*, 1 E. & B. 674.

surface, the rails being nailed to the sleepers, and the sleepers kept dry and in position by quantities of dry and hard material called ballast, placed under and about them, which prevents the sleepers being removed without its previous displacement, and without holes being formed by its falling in, are fixtures, and therefore not distrainable for rent; even though they are in practice shifted about from time to time to meet the requirements of the colliery (*p*).

If a landlord under a distress for rent sever fixtures from the freehold, and dispose of them, he is liable in trover; and the plaintiff does not thereby waive his right of maintaining that the distress is illegal because fixtures cannot be distrained (*q*). No action can be maintained for a mere constructive seizure of fixtures as a distress: as where a landlord distrains upon goods, and in his notice of distress includes fixtures, expressing an intention to sell them, but no actual seizure or severance of the latter takes place (*r*).

Growing crops.

Under this exception, at common law, growing crops and other fixtures, were exempted from distress (*s*); and in this respect a distress also differed from an execution. But now, by the statute 11 Geo. II. c. 19, s. 8 (*t*), the landlord may distrain corn, grass, or other product, growing on any part of the land demised.

11 Geo. 2, c. 19, s. 8.

Such things previously not being chattels personal were not distrainable at common law, but now they are like any

(*p*) *Turner* v. *Cameron*, L. R. 5 Q. B. 306. See also *Walmsley* v. *Milne*, 7 C. B. N. S. 115; *Lane* v. *Dixon*, 3 C. B. 776; *Wood* v. *Hewett*, 8 Q. B. 913; *Waterfall* v. *Penistone*, 6 E. & B. 876; *Holland* v. *Hodgson*, L. R. 7 C. P. 328, 337; Sm. L. & T. 3rd ed. 218.

(*q*) *Dalton* v. *Whittem*, 3 Q. B. 961. In such action their value as chattels only, not as fixtures, can be recovered. *Clarke* v. *Holford*, 2 C. & K. 540.

(*r*) *Beck* v. *Denbigh*, 29 L. J. C. P. 273.

(*s*) 1 Roll. Abr. 666.

(*t*) As to impounding the distress under this statute, see *post*, pp. 241, 242.

Part I. Chap. V.

other goods and chattels (*u*); but they cannot be sold until they are ripe (*x*).

Tenant must prove actual damage.

To entitle a tenant to recover, however, actual damage must be proved; and therefore, where a defendant seized the plaintiff's growing corn as a distress for rent, and sold it on the premises whilst in a growing state, and the purchaser having cut and carried it away, the surplus proceeds, after paying the rent, were paid over to the plaintiff, and the jury found that the plaintiff had sustained no damage by the transaction; it was held, that the plaintiff was not entitled to recover even nominal damages (*y*). And where the only things on the land are growing corn and things which are privileged *sub modo* (*z*), the landlord is not obliged to resort to the growing corn before taking the articles which are conditionally privileged (*a*). It has been held that this statute does not include trees, shrubs, and plants growing in a nursery ground, the words "other product" only applying to such products of the land as are subject to the process of becoming ripe, and of being cut, gathered, and laid up, when ripe (*b*).

Exceptions to the statute.

The power of distress given by this statute is extended only to the case of landlords distraining on the land demised; so that growing crops cannot be taken under a power in an annuity deed "to enter and distrain, and the distress then and there to detain, manage, sell and dispose of in the same manner and in all respects as distresses for

(*u*) *Glover* v. *Coles*, 1 Bing. 6.

(*x*) *Proudlove* v. *Twemlow*, 1 C. & M. 326; *Owen* v. *Legh*, 3 B. & Ald. 470.

(*y*) *Rogers* v. *Parker*, 18 C. B. 112 (distinguishing *Owen* v. *Legh*, *supra*, on the ground that it was there held that the sale was void, not the distress; and *Proudlove* v. *Twemlow*, *supra*, on the ground that there the distress was originally lawful, but the sale was unlawful and irregular), approved of in *Lucas* v. *Tarleton*, 3 H. & N. 116.

(*z*) As to which, see *post*, p. 146.

(*a*) *Piggott* v. *Bertles*, 1 M. & W. 441.

(*b*) *Clark* v. *Gaskarth*, 8 Taunt. 431; *Clark* v. *Calvert*, 8 Taunt. 742.

rent reserved upon leases for years might be managed and disposed of, and as if the said annuity or yearly sum thereby granted was a rent reserved upon a lease for years;" but the powers given by those words are limited to those given to landlords by statute 2 Will. & Mary, c. 5 (*c*).

(2) Goods delivered to a person in the way of his trade.

Things delivered to a person, exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ are absolutely exempt from distress, although there are no other goods on the premises (*d*).

Meaning of "public trade."

Some discussion has taken place as to the meaning of "public trade." Thus, in the case of *Gibson* v. *Ireson* (*e*), which held that materials in the house of a manufacturer for the purpose of his trade are not distrainable by the landlord for rent, a doubt was expressed whether it was necessary for the exemption of goods held for the purposes of trade that the trade be *public*, and, if so, what constitutes a "public trade"—Patteson, J., saying, "I do not know what is meant by the phrase 'public trade.' It is said in *Simpson* v. *Hartopp* (*f*), that materials sent to a weaver, or cloth to a tailor, to be made up, are privileged for the sake of trade and commerce; but the trade of a tailor is not public any more than that of a silk weaver. Although, therefore, the plaintiff employed the weaver as his workman for wages, it was in his calling of a silk weaver, and as the plaintiff's workman on that occasion. The goods were delivered to him to be 'worked up in the way of his trade,' according to the express words of *Simpson* v. *Hartopp*." But the difficulty has always been in ascertaining whether the goods in each particular case

(*c*) See *post*, p. 137; *Miller* v. *Green*, 2 Cromp. & Jer. 142. See also *Notts* v. *Curtis*, 1 L. J. Ex. 130. As to growing corn sold under an execution, see 14 & 15 Vict. c. 25, s. 2, *post*, p. 143.

(*d*) *Simpson* v. *Hartopp*, Willes, 512; 1 Sm. L. C. 8th ed. 458; Bullen, 95; Sm. L. & T. 3rd ed. 218.

(*e*) 3 Q. B. 39; and see *Wood* v. *Clarke*, 1 Cromp. & J. 484; and *post*, p. 128.

(*f*) *Supra*.

Part I. Chap. V.

were so circumstanced as to fall within the phrase "public trade." The following examples are clearly within the rule:—cloth bailed to a tailor to make a garment (*g*); yarn delivered to a weaver to be wove (*g*); corn sent to a mill to be ground (*h*); a horse standing in a smith's shop to be shod (*h*); or goods delivered to a common carrier for the purpose of conveyance (*i*); all these are privileged for the sake of trade and commerce, which could not be carried on if such things under such circumstances could be distrained for rent due from the person in whose custody they are (*k*). The true principle of all these cases seems to be, that where, in order that the public trade may be exercised, it becomes necessary that goods should be delivered into the custody of the person carrying it on, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered (*l*).

Public convenience.

Where an agent, under an agreement with a firm of carpet manufacturers, took premises, and put his principal's name outside as well as his own, and was entitled to carry on other agency business, but was in fact agent only for one other firm; it was held that the agent was not carrying on a "public trade" so as to exempt his principal's goods on his premises from distress (*m*).

Where a butcher had sent a beast to the shop of another butcher to be slaughtered, and after it had been slaughtered the carcase remained in his shop some time, and the landlord distrained for rent in arrear; it was held that the carcase was privileged from distress (*n*).

(*g*) *Wood* v. *Clarke, supra.*

(*h*) Co. Litt. 47 a.

(*i*) *Gisbourn* v. *Hurst*, 1 Salk. 249. See also *Gibson* v. *Ireson*, 3 Q. B. 39; *Gilman* v. *Elton*, 3 B. & B. 75; *Thompson* v. *Mashiter*, 1 Bing. 283; and *Mathias* v. *Mesnard*, 2 C. & P. 353.

(*k*) *Wood* v. *Clarke*, 1 Cromp. & J. 484.

(*l*) Per Alderson B., in *Muspratt* v. *Gregory*, 3 M. & W. 678.

(*m*) *Tapling* v. *Weston*, 1 C. & E. 99.

(*n*) *Brown* v. *Shevil*, 2 A. & E. 138.

But although, as we have seen, materials delivered by a manufacturer to a weaver, to be by him manufactured at his own house, are privileged from distress for rent due from the weaver to his landlord, a frame or other machinery delivered by the manufacturer to the weaver, together with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, is not privileged, unless there be other goods upon the premises sufficient to satisfy the rent due (*o*).

If a horse goes with yarn to a weaver, or fetches yarn from thence, and carries it to a private house to be weighed, and it is hung there till the yarn be weighed, neither the horse nor the yarn can be distrained (*p*). So a horse which brings corn to market, and is put into a private yard while the corn is being sold, cannot be distrained; because the bringing of the corn there is in the way of trade, and consequently of public benefit.

Things employed in carrying and fetching away goods.

In fact, it may be stated generally, that whatever is employed in carrying and fetching away any goods to be delivered to a person exercising the public trade is privileged equally with the goods themselves (*q*). So goods or cattle in a public fair or market are privileged from distress, because the maintenance of the fair or market is for the public good (*r*).

Cattle on their way to a fair.

Cattle are said to be privileged as well on their way to as at a public fair or market. Thus it was held in one case that cattle which are being driven to a market or fair, and are put into pasture on the way for one night, are privileged from distress (*s*). But horses and carriages

(*o*) *Wood* v. *Clarke*, 1 Cromp. & J. 484.

(*p*) *Rede* v. *Burley*, Cro. Eliz. 596.

(*q*) 1 M. & W. 646, 647; Bullen, 99.

(*r*) Co. Litt. 47 a; Roll. Abr. 668; 1 M. & W. 647; *Launceston's case*, Cro. Eliz. 75; *Leadenhall Market*, 2 Lord Raym. 1589; *Rede* v. *Burley*, *supra*; *Austin* v. *Whittred*, Willes, 623, n. (a), 628.

(*s*) *Tate* v. *Gleed*, 2 Wms. Saund. 290, n. (*f*); 1 M. &

standing at livery are liable to be distrained by the landlord of the premises.

The principle of the cases seems to be, that if articles are sent to remain at a place, they are distrainable. If sent for a particular purpose, and the remaining at the place is an incident necessary for the completion of such purpose, they are not (*t*).

Muspratt v. *Gregory.*

In the case of *Muspratt* v. *Gregory* (*u*), the principles laid down by the Courts in deciding cases of this nature were very fully discussed, and the notes in *Simpson* v. *Hartopp*, relating to exemptions in cases of "public trade," commented on. In the former case the manufacturer and seller of salt granted a rent and charged it upon his salt works and premises at which he sold salt publicly to all persons who came for it, and there was a cut or canal on the premises, communicating with a public navigation, in which boats coming for salt were accustomed to lie. The plaintiff, an alkali manufacturer, sent a boat to be laden with salt, which he required for the purposes of manufacturing the alkali, and the boat lying in the canal out of the plaintiff's possession was distrained for the arrears of the rent-charge; it was held that the boat could be distrained, and was not exempted by privilege. Alderson, B., in that case, remarks: "The leading case on this subject is that of *Simpson* v. *Hartopp*, in which Lord Willes, C. J., in delivering the judgment of the Court, goes very fully into the law on this point. He lays it down that there are five sorts of things which at common law were not distrainable. Now of the exemptions enumerated by Lord Willes it is plain that only the second (things delivered to a person exercising a public trade to be carried, wrought,

W. 647; Bullen, 100; and see remarks of Alderson, B., on *Fowkes* v. *Joyce*, 3 Lev. 260.

(*t*) *Francis* v. *Wyatt*, 3 Burr. 1498; *Parsons* v. *Gingell*, *Lewis* v. *Gingell*, 4 C. B. 545; Woodf. L. & T. 10th ed. 402.

(*u*) 1 M. & W. 633; 3 M. & W. 678.

or managed in the way of his trade or employ) can be at all applicable to this case the boat is clearly not within the description of goods delivered to a tradesman 'to be carried or wrought' in the way of his trade or employ; for there is nothing to be done to it; it is not brought to be repaired or altered in any way. Then is it delivered to be '*managed*' in the way of the trade or employ of the person to whom it is so delivered? In *Simpson* v. *Hartopp* the word 'managed' appears to be used as synonymous with 'manufactured;' but that is too limited a sense of the expression; for the Courts have held that goods sent to a factor by a merchant are privileged from distress under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer, and also to the dealing of the goods as articles of trade in their original or their wrought state as articles of commerce, as a factor." And Bolland, B., also remarks: "It has been contended at the bar that it can be put upon the benefit to trade alone; I cannot, however, find any authority to support that position to the extent that is in this case contended for. The reported cases that come nearest to the present are those of the yarn carried to be weighed at a private beam, if in the way of trade (*x*), or of the horse that had carried corn to a mill to be ground, and during the grinding of the corn was tied to the mill door. In these cases the goods and the horse taken were held to be privileged from distress for rent; but the Court, according to the reports, appears to have mainly proceeded upon the ground of the goods being under the personal care of their owner at the time of the taking. The boat in the present case had no such protection. It was left by the owner, and the privilege contended for is put as attaching to the boat upon the benefit to trade only. As, therefore, it does not appear to me that the boat comes within either of the five rules of

Things "to be carried or wrought."

Things delivered to be "managed."

(*x*) *Rede* v. *Burley*, Cro. Eliz. 596.

exemption laid down in Co. Litt. 47 a, and pointed out by the Court in *Simpson* v. *Hartopp*, and as the owners had, by leaving the boat, taken away that protection which in *Rede* v. *Burley* (*y*) was thrown around the goods, and was the ground upon which the Court held them privileged from distress, I am of opinion that the boat was legally distrained."

This case was affirmed in the Court of Exchequer Chamber, where Lord Denman, C. J., says:—"Many other cases may be suggested in which such an exemption may be thought conducive to the public good, and to the interests of trade. If a lodger leaves his furniture in a public lodging-house (*z*), or if a farmer having brought malt to a brewer leave his cart in the yard, intending to bring back grains or beer when ready to be loaded, it might equally be contended that such things are exempt from distress. But we find no authority for holding that they are so. In the notes to 2 Saunders' Reports, 289 (b), Serjeant Williams says, 'It seems that cattle belonging to a drover, being put into ground with the consent of the occupiers to graze only one night on their way to a fair or market, would not at this day be held liable to the landlord's distress for rent'; though the *contra* had been ruled in *Fowkes* v. *Joyce* (*a*). With respect to this case, the cattle may reasonably be considered as having continued in the possession of the drover; but, supposing the cattle to be privileged from distress on the sole ground of affording encouragement and protection to persons frequenting fairs and markets, we have no authority to extend that privilege in derogation of a landlord's rent to mere customers resorting to the shop, warehouse, or manufactory of individuals. Being therefore unable to find any acknowledged class of exemption under which the present case can be ranged, or to which it can by fair analogy be

(*y*) *Supra.*

(*z*) See as to this, the Lodgers' Goods Protection Act, 1871, *post*, p. 156.

(*a*) 3 Lev. 260.

compared, we think that the privilege contended for ought not to be allowed, and that the judgment of the Court of Exchequer ought to be affirmed."

The authorities on this subject have been reviewed in the recent case of *Clarke* v. *The Millwall Dock Co.* (*b*), where it was laid down that goods belonging to a third party, which are on the premises of a person exercising a public trade for the purpose of being dealt with in the way of such trade, are not exempt from distress for rent unless they have been *sent* or *delivered* to the trader. In that case a shipbuilder contracted to build a ship upon premises which he held as tenant to the defendants; the ship was to be paid for by instalments at certain stages of the work. After the ship had been partly paid for it was seized by the defendants as a distress for rent due from the builder. The person for whom the ship was being built paid the rent under protest, and sued to recover the amount. It was held (affirming the judgment of Pollock, B.) that, assuming the property in the ship to have passed to the plaintiff under the contract, still the ship, not having been sent or delivered to the builder, was liable to distress, and the plaintiff was not entitled to recover; Herschell, L. C., remarking, "The sole question to be decided in this case is, whether a ship which was being built for the plaintiff in a dry dock, which was rented from the defendants by a person of the name of Gilbert, was or was not exempt from distress for rent due from Gilbert, the shipbuilder, to the defendants? Now on looking at the terms of the rule (laid down in *Simpson* v. *Hartopp*), it appears to be as much a part of it that the property should be delivered to a person carrying on a trade, as it is that the property should be on the premises for the purpose of being carried, wrought, worked up or managed, in the way of the trade. If the rule is to be limited in the one direction, it follows that it must also be limited to cases where there is in some

(*b*) L. R. 17 Q. B. D. 494.

sense delivery of the property. It is essential that one person having the right to possession should have entrusted the property to another person for trade purposes. I cannot reject the term 'delivered' in interpreting the rule."

Rates of toll for carriage of goods.

Where a canal company were empowered by statute to impose rates of toll for carriage of goods on the canal, and to fix the places of payment, and, in case of non-payment, to seize the goods in respect of which such rates ought to have been paid, or any part thereof, and the boat laden therewith, and detain the same until payment of such rates, and also all arrears of the said rates due from the owner of such boat; and if such goods were not redeemed within seven days to sell the same, as in cases of distress for rent; it was held, that this clause did not empower the company to sell the boats, or to distrain goods when no longer upon the canal (*c*). And again, in another case where a canal company were authorized by statute in the same way to demand tolls, and detain and distrain the same in like manner, but they were not expressly authorized to levy any toll upon the carriages; it was held, that trams could not be distrained for arrears of toll due from the owners for goods carried in them, if they were not carrying the goods of such owners at the time of the distress (*d*).

A dock company by their act of incorporation was empowered to receive for all goods deposited on their premises rates not exceeding those usually paid in the Port of London for wharfage of such goods, and in case default was made in payment of the rates the collectors of the company were to retain and sell all or any part of such goods, and out of the moneys thence arising to retain and pay the rates payable in respect of such goods, returning the overplus to the party entitled; and in case such goods should

(*c*) *Fraser* v. *Swansea Canal Co.*, 1 Ad. & Ell. 354.

(*d*) *Jenkins* v. *Cooke*, 1 Ad. & Ell. 372. See *M. S. & L. Ry. Co.* v. *The North Central Wagon Co.*, L. R., 13 App. Cas. 554.

be removed before the rates were paid it was lawful for the company to distrain or sell any goods of the owner in manner before mentioned. Certain rates payable in respect of goods belonging to A., which had previously been removed from the premises of the company, being unpaid, the company claimed to distrain other goods of A. then on the premises until payment of the rates due in respect of both those sets of goods. A. had applied to have the goods then on the premises delivered up to him, and was informed by the company that no more goods would be delivered to his order until his debt was paid or reduced. It was held that the statute enabled the company to distrain and sell any goods in their possession for the recovery of rates payable in respect of other goods of the same owner (*e*).

A private Act of Parliament imposed a duty of 2*s.* per chaldron upon all coal "imported and landed at the town of H., or otherwise brought or delivered within the limits of the town." The Act gave a remedy against the ship-owner by distraining the ship and tackle as well as the coals in default of payment. At the time that the Act was passed no coals were brought into H. except by sea. It was held that coals brought into the town by railway were liable to the duty, and not only "sea-borne" coals, and that the railway company, as the persons who brought the coals into the town, were primarily liable to pay the duty (*f*).

Brewer's casks, deposited in a public-house, full of beer, and left there until the beer is consumed, are liable to be distrained for rent in arrear in respect of the house. If a cooper had had the casks in his possession for the purpose of repairing them in the way of his trade, they would have been exempted from distress (*g*).

Factors and auctioneers.

It remains for us to consider a class of cases in which goods sent to persons for the purposes of sale are privileged

(*e*) *Green* v. *St. Katherine's Dock Co.*, 19 L. J. Q. B. 53.

(*f*) *G. E. R. Co.* v. *Harwich* (*Mayor, &c.*), 41 L. T. N. S. 533.

(*g*) *Joule* v. *Jackson*, 7 M. & W. 450.

Part I. Chap. V.

Privilege for the benefit of trade and public convenience.

from distress for rent due from the factor or auctioneer to his landlord; and they are privileged on the same grounds as those which we have mentioned above, namely, that the goods are protected for the benefit of trade, and for the convenience of the public at large. Thus, a carriage sent to a coachmaker and commission agent for the sale of carriages, for the purpose of being sold by him, is not liable to be distrained for the rent of the premises upon which it is so exposed for sale (*h*). So, also, goods of a principal in the hands of a factor for sale are privileged from distress for rent due from such factor to his landlord (*i*). And the same privilege extends where the factor has no warehouse of his own, but deposits the goods in the warehouse of another person (*k*). And also, where goods are landed at a wharf and consigned to a broker as agent of the consignor for sale, and placed by the broker in the wharfinger's warehouse over the wharf for safe custody until an opportunity for selling them should occur, they are not distrainable for rent due in respect of the wharf and warehouse, as they were brought to the wharf in course of trade (*l*).

Auctioneers.

These cases have been extended to auctioneers. And so where goods were deposited for sale by auction on the premises of an auctioneer, it was held that they were not liable to be distrained for rent in arrear in respect of those premises; nor would a misrepresentation as to the ownership, made by the auctioneer in advertising the sale, although it might vitiate the sale, as between buyer and seller, destroy the exemption from distress. Accordingly, where a manufacturer sent goods to a public auction-room to be sold by an auctioneer, who had hired the rooms for a short period, and who advertised the intended sale of

(*h*) *Findon* v. *McLaren*, 6 Q. B. 891.

(*i*) *Gilman* v. *Elton*, 3 B. & B. 75.

(*k*) *Mathias* v. *Mesnard*, 2 C. & P. 353.

(*l*) *Thompson* v. *Mashiter*, 1 Bing. 283.

those and other goods received in the same way as "under an assignment for the benefit of creditors," the goods having been distrained for rent due for the auction-room from the party of whom it was hired, it was held that they were privileged from distress. Lord Lyndhurst, C. B., in that case, says, "What is a factor? A factor is a person who receives the goods of another for the purpose of selling those goods on account of the owner. What is an auctioneer? An auctioneer receives the goods of other persons for the purpose of sale on account of the owners of those goods." He then goes on to say (in referring to cases where goods are sent to fairs and markets), "It is highly beneficial to the manufacturers of goods, to handicraftsmen, and to many others who are engaged in disposing of them—where will they be likely to dispose of them? Why, at those places to which purchasers will from time to time resort; they will resort to a fair or market, and therefore the privilege and the exemption from distress at that place is of great importance to the person who is the proprietor, or the original manufacturer of the goods" (*m*). And this rule applies, although the auctioneer has obtained possession of the room in which the goods were sold by an act of trespass (*n*). The fact of such room never having been used as an auction-room before, and only being hired for the occasion, is immaterial (*o*). And the goods will be privileged during the time they are *on the premises* of the auctioneer for the purposes of sale, even if in an open yard attached to his premises (*p*). On the same principle goods deposited in a granary or warehouse for hire, to be safely kept for the purposes of trade, are privileged from distress (*q*). But where the auctioneer is not the occupier

Definition of a factor.

Definition of an auctioneer.

(*m*) *Adams* v. *Grane*, 1 C. & M. 380.

(*n*) *Brown* v. *Arundel*, 10 C. B. 54.

(*o*) *Brown* v. *Arundel*, *supra*.

(*p*) *Williams* v. *Holmes*, 8 Exch. 861.

(*q*) *Farrant* v. *Robson*, 3 L. J. C. P. 146; *Miles* v. *Furber*, L. R. 8 Q. B. 77, distinguish-

of the premises (as where he advertised a sale at a private house), the goods will not be privileged from distress for rent due by the tenant of that house to his landlord (*r*).

In another case, an auctioneer sold certain goods for the owner on premises occupied by the owner and another person, and in respect of which the latter owed the landlord rent. By the conditions of sale, each lot was to be taken to be delivered at the fall of the hammer, after which time it was to remain at the exclusive risk of the purchaser. After the sale, and before the goods were removed, the landlord threatened to distrain on the goods, whereupon the auctioneer paid the rent, and deducted it from the amount which the goods had realised, and paid over the balance to the owner. It was held that the auctioneer was not justified in paying the rent, as on the sale of each lot the property passed to the purchaser, who would have had to bear the loss if the landlord had distrained (*s*).

Pawnbrokers.

Goods in the possession of a pawnbroker as a security for money advanced are also privileged; and the pawnbroker is entitled to recover their full value from the landlord, and not merely the amount which he has advanced upon them (*t*).

Goods at an inn.

The cattle and goods of guests at an inn are privileged from distress; for they are there necessarily in the way of trade, and an inn being a place "*publici juris*," all men

ing the case of *Parsons* v. *Gingell*, *supra*, because there it appeared that horses and carriages were only placed there for a casual purpose, and might be removed at any time.

(*r*) *Lyons* v. *Elliott*, L. R. 1 Q. B. D. 210, which is distinguished from *Thompson* v. *Mashiter*, *supra*, on the ground that the decision there was, that where goods are deposited by a factor in a warehouse, it is not necessary to look to the kind of occupation of the warehouse had by the factor; as it makes no difference whether it was in his regular occupation, or only hired for the purpose of the deposit.

(*s*) *Sweeting* v. *Turner*, L. R. 7 Q. B. 310.

(*t*) *Swire* v. *Leach*, 18 C. B. N. S. 479.

have a right to use it without molestation (*u*). But they must be actually within the premises of the inn itself, and not in a place to which the innkeeper has removed them for his own convenience. So where an innkeeper placed a race-horse in a stable half a mile away from the inn, it was held that the privilege could not extend to this stable; and that consequently the race-horse was distrainable by the landlord of the stable (*x*).

This privilege only extends to temporary guests; for a person who hires an unfurnished room at an inn by such hiring becomes an under-tenant; and any furniture that he may have brought into such room must be liable to the landlord's distress (*y*). Such an exemption is not lost by length of time, so long as the things remain fairly under the same circumstances (*z*).

(3) Cocks and sheaves of corn, and other things which cannot be restored in the same plight.

Things of a perishable nature are also privileged from distress; and things which are liable to be easily lost, or which cannot be identified. The reason for this exemption was that a distress being at common law merely a pledge, things were held not to be distrainable which could not be restored in the same plight as they were in at the time of taking them (*a*). Thus, at common law, fruit, milk, and other things of a like perishable nature, were exempted under this rule (*b*); and money, unless it were in a bag, so that the same identical pieces might be known (*c*). Nor could the flesh of animals lately slaughtered be distrained, as it must necessarily be damaged by being removed (*d*). Neither could grain, or flour taken out of a sack, nor

(*u*) Bac. Abr. Inns and Innkeepers (B); Bullen, 96; *Robinson* v. *Walter*, 3 Bulstr. 269.

(*x*) *Crosier* v. *Tomkinson*, 2 Lord Ken. 439; Bullen, 98; Sm. L. & T. 3rd ed. 221.

(*y*) Woodf. L. & T. 10th ed. 403.

(*z*) 7 Roll. Abr. 668; 2 Bac. Abr. Distress, (B); Bullen, 98.

(*a*) Co. Litt. 47 a; Gilbert on Distress, 34; 3 Black. Com. 7.

(*b*) 3 Black. Com. 9; Bullen, 91.

(*c*) 1 Roll. Abr. 667; 2 Bac. Abr. 109.

(*d*) *Morley* v. *Pincombe*, 2 Exch. 101.

Part I. Chap. V.

hay from a barn; for in these cases the exact quantity taken and the identity could not be ascertained (*e*). Nor could corn in the sheaf be taken, because the grain must be shed and scattered by removal; unless, indeed, it were found in a cart, in which case it could be removed altogether without loss or injury (*f*). With regard to corn (*g*), provision has been made by the statute 2 Will. & Mary, sess. 1, c. 5, s. 3, which enacts, that "any person or persons having rent in arrear and due upon any demise, lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose, or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land or ground charged with such rent, and lock up or detain the same in the place where it shall be found for or in the nature of a distress, until the same shall be replevied or sold; but the same must not be removed from such place to the damage of the owner." This provision is held to extend to corn in whatever state it may be, whether threshed or unthreshed (*h*). In default of the distress being replevied the landlord must sell at the expiration of five days (*i*); but the sale will be wholly void if sold before the crops are ripe (*k*).

Corn.

2 Will. & Mary, sess. 1, c. 5, s. 3.

Hay or straw.

The grantee of a rent-charge may distrain hay or straw, loose or in the stack, under the provisions of this statute, and also of the statute 4 Geo. II. c. 28, s. 5 (which gives in respect of rents-seck the same power of distress as exists in the cases of rent reserved upon leases) (*l*). But where there was a power in an annuity deed "to enter

(*e*) 1 Roll. Abr. 667; Bullen, 91.

(*f*) *Ibid.*

(*g*) See *Wilson* v. *Duckett*, 2 Mod. 61.

(*h*) *Bellasis* v. *Burbridge*, 1 Lutw. 214.

(*i*) *Piggott* v. *Bertles*, 1 M. & W. 441.

(*k*) *Owen* v. *Legh*, 3 B. & Ald. 470; *Proudlove* v. *Twemlow*, 1 Cr. & M. 326.

(*l*) *Johnson* v. *Faulkner*, 2 Q. B. 925; Sm. L. & T. 3rd ed. 229.

and distrain, and the distress then and there to detain, manage, sell, and dispose of in the same manner as distresses for rent, and as if the said annuity thereby granted was a rent reserved upon a lease for years;" it was held that the powers given by these words were limited to those given to landlords by statute 2 Will. & Mary, c. 5, and did not extend to the statute 11 Geo. II. c. 19 (*m*), so as to enable growing crops to be seized (*n*). Corn sown by a tenant at will, who died before harvest, and purchased by another person, cannot be distrained by the landlord for rent due from a subsequent tenant (*o*).

(4) Things in actual use.

Whatever is in a man's present use and occupation is during that time privileged from distress for rent, or for damage feasant; the reason being that an attempt to distrain things in such a situation might probably lead to a breach of the peace (*p*). So, a horse which a man is actually riding, or an axe in a man's hand cutting wood, or the like, cannot be distrained for rent (*q*); nor a horse or a dog which a man is leading by a string, nor any animal which is under the immediate control of the owner; but a dog used for sporting purposes, or permitted to run into the woods, and not led by a string, is not exempt from a distress for damage feasant, though it would be if such dog were within sound of the owner's whistle, though he himself was out of sight (*r*).

Dogs.

It is not necessary for the person to aver that the peace was in danger, nor that the things taken were in manual use; it is sufficient if they were in the actual possession of the plaintiff, under his personal care, and being actually used by him (*s*). If ferrets and nets in a warren are "damage feasant," a distress on them is good; but if they

(*m*) See *ante*, p. 138.

(*n*) *Miller* v. *Green*, 2 Cromp. & J. 142.

(*o*) *Eaton* v. *Southby*, Willes, 131.

(*p*) *Simpson* v. *Hartopp*, 1 Sm. L. Cas. 8th ed. 455; Willes, 512.

(*q*) Co. Litt. 47 a; *Storey* v. *Robinson*, 6 T. R. 138.

(*r*) *Bunch* v. *Kennington*, 1 Q. B. 679.

(*s*) *Field* v. *Adames*, 12 Ad. & Ell. 649.

are in the hands of a man they cannot be distrained (*t*). So, also, a loom cannot be distrained when in the actual use of the weaver (*u*), nor can wearing apparel, if in actual use, but when not being worn by the owner it may be distrained (*x*); unless it is under the value of 5*l.*, which is now absolutely privileged (*y*). Yarn being carried on a man's shoulders to be weighed cannot be distrained, any more than a net in a man's hand, or a horse on which a man is riding (*z*).

There is an old case (*a*) in which it has been held that horses and their harness fastened to a cart which was loaded with corn might be distrained for rent; but this case is disapproved of in *Simpson* v. *Hartopp*.

It has been held that if a man has two mill-stones, and only one is in use, and the other lies by not used, it may be distrained for rent (*b*).

There are several cases in which tools of trade, which, as we shall see hereafter, are privileged *conditionally* (*c*), are *absolutely* privileged, if they be in actual use at the time. And these tools of trade, if in actual use, are privileged from distress, although there is no other sufficient distress on the premises (*d*). But a threshing-machine is not privileged from distress, unless it is in actual use at the time, or there be other sufficient distress on the premises (*e*). It will be seen later on in this chapter (*f*) that

(*t*) Harg. Co. Litt. 47. See also *Reynell* v. *Campernoon*, Cro. Car. 228.

(*u*) *Simpson* v. *Hartopp*, 1 Sm. L. Cas. 8th ed. 455; Willes, 512; *Watts* v. *Davis*, 1 Selwyn, N. P. 9th ed. 676.

(*x*) *Bissett* v. *Caldwell*, 1 Peake, 50; *Baynes* v. *Smith*, 1 Esp. 207.

(*y*) Law of Distress Amendment Act, 1888, sec. 4.

(*z*) *Read's case*, Cro. Eliz. 594.

(*a*) *Webb* v. *Bell*, 1 Vent. 36; but see *Storey* v. *Robinson*, 6 T. R. 138; and Harg. n. 293, on Co. Litt. 47 a.

(*b*) P. 14, H. 8, pl. 16, cited in *Simpson* v. *Hartopp*, *supra*.

(*c*) See *post*, pp. 150, 151.

(*d*) *Gorton* v. *Falkner*, 4 T. R. 567.

(*e*) *Fenton* v. *Logan*, 9 Bing. 676; *Nargatt* v. *Nias*, 1 Ell. & Ell. 439.

(*f*) *Post*, pp. 145, 151, Law of Distress Amendment Act, 1888, s. 4.

the tools and implements of a man's trade up to the value of 5*l.* are now absolutely privileged from distress.

(5) Animals *feræ naturæ*.

Things wherein no man can have an absolute and valuable property are by their very nature exempted from liability to a distress for rent: for everything distrained is presumed to be the property of the wrongdoer, which these things cannot be. Therefore deer and rabbits in their wild state, cats, and all animals *feræ naturæ*, cannot be distrained (*g*). But if deer are kept in a private enclosure (not being a park), for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent (*h*). So, also, deer in a park may be distrained, unless they are in a wild state (*i*); and birds kept in cages, as parrots or canaries, have been held to be the subjects of a right of property, and may therefore be distrained (*k*). Pheasants and partridges before they can fly may also be private property, and the subject of larceny (*l*). Dogs, though formerly held to be within this exception, as animals in which no property could be had (*m*), must be considered liable to distress at the present day (*n*).

Deer.

(6) Things in the custody of the law.

We must now consider the rule that goods in the custody of the law are not distrainable. Under this rule things already distrained for rent, or taken damage feasant,

(*g*) Co. Litt. 47 a; Bullen, 90; 1 Sm. L. Cas. 461; Finch, 176; Bro. Abr. "Property," pl. 20; Com. Dig. Distress, (C); Keilway, 30 b; 1 Roll. Abr. 666.

(*h*) *Davies* v. *Powell*, Willes, 46; Bro. Abr. "Property," pl. 34.

(*i*) *Ford* v. *Tynte*, 31 L. J. Ch. 177; *Morgan* v. *Earl of Abergavenny*, 8 C. B. 768.

(*k*) Bullen, 90.

(*l*) *Reg.* v. *Cory*, 10 Cox, C. C. 23; *Reg.* v. *Shickle*, L. R. 1 C. C. R. 158.

(*m*) Co. Litt. 47 a.

(*n*) *Davies* v. *Powell*, Willes, 48; *Binstead* v. *Buck*, 2 W. Black. 1117; *Bunch* v. *Kennington*, 1 Q. B. 679; Sm. L. & T. 3rd ed. 222; and 4 Black. Com. 235. The statutes which make the stealing of dogs punishable do not affect this question. See *Reg.* v. *Robinson*, 28 L. J. M. C. 58.

goods in the hands of a bailiff, taken under an execution, or seized by process at the suit of the Crown, or taken under attachment, are privileged from distress (*o*). But where after the making of an interpleader order the sheriff with the consent of the execution creditor and the claimant temporarily withdrew from possession; it was held that the goods were no longer *in custodiâ legis*, and the landlord was entitled to distrain upon them although he knew that the interpleader proceedings were pending (*p*).

8 Anne, c. 14, s. 1.

By 8 Anne, c. 14, s. 1, "No goods taken on any lands leased for life, years, at will, or otherwise, shall be taken in execution, unless the party at whose suit execution is sued, before removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent, and if more, then the amount of one year's rent due at the execution" (*q*). Under this statute the goods are equally *in custodiâ legis* for this purpose, whether they are in the hands of the sheriff, or of his vendee (*r*).

Goods remaining on the premises after a fictitious bill of sale.

If goods remain on the demised premises after a fictitious bill of sale made under an execution, they are liable to be distrained as before (*s*).

And where the execution was irregular, as where a sheriff's officer executed a *fieri facias* by going to the house and informing the debtor that he came to levy on his goods, and, laying his hand on a table, said, "I take this

(*o*) Co. Litt. 47 a; Willes, 136; 1 Inst. 47 a; Gilb. on Distress, ed. 1757, p. 44.

(*p*) *Cropper* v. *Warner*, 1 C. & E. 152.

(*q*) There are similar enactments in the Acts relating to the County Courts and the Court of Admiralty. 24 Vict. c. 10, s. 16; 51 & 52 Vict. c. 43, s. 160. The statutory power of distress given by the 19 & 20 Vict. c. 108, s. 75, which statute has however been repealed by the 51 & 52 Vict. c. 43, *supra*, did not extend to cases in which the goods seized belonged to a stranger, and not to the tenant. *Beard* v. *Knight*, 8 E. & B. 865; *Wilcoxon* v. *Searby*, 29 L. J. Ex. 154.

(*r*) *Wharton* v. *Naylor*, 12 Q. B. 673; *Riseley* v. *Ryle*, 11 M. & W. 16. But see *Ex parte Davis, In re Pollen's Trustees*, 54 L. T. N. S. 304.

(*s*) *Smith* v. *Russell*, 3 Taunt. 400.

table," and then locked up his warrant in the table drawer, took the key, and went away without leaving any person in possession, and after the writ was returnable the landlord distrained the goods for rent; it was held that the distress was lawful (*t*).

A landlord's right to distrain revives if the execution has been waived (*u*).

Goods seized by a messenger under a bankruptcy have been held not to be privileged, as being in the custody of the law, from distress for rent due from the bankrupt to his landlord (*x*); and the same rule applies to goods in the possession of a receiver in a legatee's suit (*y*).

Growing corn sold under an execution.

Formerly growing corn sold under an execution could not be distrained for rent, unless the purchaser allowed it to remain on the ground an unreasonable time after it was ripe. Such corn, whilst in the possession of the purchaser from the sheriff, being considered as in the custody of the law, could not be distrained upon; but after the expiration of such reasonable time it might be (*z*). Now, by the 14 & 15 Vict. c. 25, s. 2, growing crops seized and sold by the sheriff under an execution are liable, as long as they remain on the land, to be distrained for the rent which becomes due after the seizure and sale, provided there is no other sufficient distress, notwithstanding any sale or assignment which may have been made of such growing crops by the sheriff (*a*).

14 & 15 Vict. c. 25, s. 2.

(*t*) *Blades* v. *Arundale*, 1 M. & S. 711.

(*u*) *Seven* v. *Mihill*, 1 Lord Ken. 370.

(*x*) *Briggs* v. *Sowry*, 8 M. & W. 729; *Newton* v. *Scott*, 9 M. & W. 434; 10 M. & W. 471; *Phillips* v. *Shervil*, 6 Q. B. 944.

(*y*) *Sutton* v. *Rees*, 32 L. J. Ch. 437. For decisions on this subject with regard to outlawry, see Bullen, 85; Woodf. L. & T. 10th ed. pp. 405, 406. Outlawry in civil proceedings is now abolished by 42 & 43 Vict. c. 59.

(*z*) *Wharton* v. *Naylor*, 12 Q. B. 673; *Peacock* v. *Purvis*, 2 Brod. & B. 362; *Wright* v. *Dewes*, 1 Ad. & Ell. 641; *Ex parte Davis*, *In re Pollen's Trustees*, 54 L. T. N. S. 304.

(*a*) For remarks on this statute, see Woodf. L. & T. 12th ed. 414.

Part I. Chap. V.

56 Geo. 3, c. 50, s. 1.

And it is provided by the statute 56 Geo. III. c. 50, s. 1, that "no sheriff or other officer shall, by virtue of any process of any Court of law, carry off or sell or dispose of, from any lands let to farm, any straw, chaff, clover, &c., nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, made for the benefit of the owner or landlord of any such farm, such straw, roots, or vegetables ought not to be taken off such lands, or which, by the tenor of such agreements, ought to be used or expended thereon, and of which agreements such sheriff or other officer shall have received a written notice before he shall have proceeded to sale."

By sect. 3, it is enacted that "any crops of produce of this description may be sold by the sheriff, subject to an undertaking to expend them on the land according to the custom of the country, or according to the terms of any covenant or written agreement which has been entered into by the tenant."

By sect. 6, "In all cases where any purchaser or purchasers of any crops or produce hereinbefore mentioned shall have entered into any agreement with such sheriff, or other officer, touching the use or expenditure thereof on lands let to farm, it shall not be lawful for the owner or landlord of such lands to distrain for any rent on any corn, hay, straw, or other produce thereof which, at the time of such sale, and the execution of such agreement entered into under the provisions of this Act, shall have been severed from the soil and sold, subject to such agreement by such sheriff or other officer; nor on any turnips, whether drawn or growing, if sold according to the provisions of this Act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever; nor on any waggons, carts or other implements of husbandry, which any person or persons shall employ, keep or use on such lands for the purpose of threshing out, carrying or consuming any such corn, hay, straw, turnips, or other produce, under the provisions of

the Act, and the agreement or agreements directed to be entered into between the sheriff, or other officer, and the purchaser or purchasers of such crops and produce as hereinbefore are mentioned."

Where a tenant is bound by his covenants, or the custom of the country, to consume on the premises all the corn and hay growing on the farm, it was decided in the case of *Abbey* v. *Petch* (*b*) that the landlord, on distraining those articles, might dispose of them, subject to a condition that the purchaser shall consume them on the premises. This decision was, however, questioned in the case of *Frusher* v. *Lee* (*c*), and finally overruled in the cases of *Ridgway* v. *Lord Stafford* (*d*) and *Hawkins* v. *Walrond* (*e*), which decided that such a restriction could not be legally imposed by the landlord. An execution creditor who, by reason of his claiming some things distrainable at common law, is driven to rely on this statute, is bound to bring himself in his pleading within the provisions of the statute (*f*).

Agricultural Holdings (England) Act, 1883.

By the Agricultural Holdings (England) Act, 1883 (*g*), a new kind of *absolute* exemption from distress has arisen. But it must be remembered that this exemption only applies to holdings *under* the Act (*h*). It is provided by sect. 45 of this Act that "agricultural or other machinery which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant under a *bonâ fide* agreement with him for the hire or use thereof in the conduct of his business shall not be distrained for rent in arrear."

(7) Wearing apparel, bedding and tools

A further change has taken place by the Law of Distress Amendment Act, 1888 (*i*), which by sect. 4 (following the

(*b*) 8 M. & W. 419.
(*c*) 10 M. & W. 709.
(*d*) 6 Exch. 405.
(*e*) L. R. 1 C. P. D. 280. See also *Jones* v. *Hamp*, 10 M. & W. 700.
(*f*) *Hutt* v. *Morrell*, 11 Q. B. 425, 438.
(*g*) 46 & 47 Vict. c. 61.
(*h*) See *post*, p. 180.
(*i*) 51 & 52 Vict. c. 21. This section takes effect from the 7th of August, 1888.

Part I. Chap. V.

of trade to value of 5*l*.

provisions of sect. 96 of the County Courts Act, 1846 (*k*)), exempts from distress the wearing apparel and bedding of the tenant or his family, and the tools and implements of his trade to the value of 5*l*. But this is not to extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded, and where the distress is made not earlier than seven days after such demand.

II. Things conditionally privileged.

We must now consider those things which are privileged from distress conditionally; that is to say, provided there be other sufficient distress upon the premises. These are divided into two classes—

(1) Beasts of the plough and instruments of husbandry, and

(2) The instruments of a man's trade or profession.

Reason of the rule.

The reason of the rule laid down with regard to this conditional kind of privilege seems to have originated at common law, where the distress was considered as a mere pledge to compel the payment of the rent, and these things were looked upon with more favour, as being probably the chief means which the party distrained upon had of gaining his livelihood and to satisfy the demands of the distrainor (*l*).

We have already mentioned that goods of this description may be *absolutely* privileged on account of their being *in actual use* (*m*).

(1) Beasts of the plough and instruments of husbandry. 51 Hen. 3, stat. 4.

Beasts of the plough and sheep are privileged, both by the common law, and by the statute 51 Hen. III. stat. 4, which enacts, that "no man shall be distrained by his beasts that gain his land, nor his sheep, either by the king

(*k*) Repealed by sect. 188, and re-enacted by sect. 147 of the County Courts Act, 1888.

(*l*) 3 Black. Com. 9; Willes, 515; Bullen, 101.

(*m*) See *ante*, p. 139.

or any other, while there is another sufficient distress to be found—(except for damage feasant)."

Cart-colts and young steers, not broken in or used for harness or the plough, are not privileged from distress "as beasts which gain the land" (*n*).

Beasts of an under-tenant.

In case of a distress by a landlord for rent due from his tenant, the sheep of an *under-tenant* are privileged, if there are other goods upon the premises sufficient to satisfy the rent; and the owner of sheep so seized is entitled to recover from the distrainor, not merely nominal damages, but the full value of the sheep (*o*).

An action is not maintainable for distraining beasts of the plough when there is no other sufficient subject of distress on the premises but growing crops (*p*). And when a landlord distrains beasts of the plough, though there are other goods on the premises, he is not liable to an action for illegal distress, if he uses due diligence to ascertain whether such goods are a sufficient distress without them; and he is not to be affected by a subsequent sale at a higher price than was expected (*q*).

Instruments of husbandry.

In this exception must be also placed instruments of husbandry, which are privileged "*sub modo*" in the same way as beasts of the plough (*r*).

Agricultural Holdings (England) Act, 1883.

We have already referred to the privilege on agricultural machinery given by the Agricultural Holdings (England) Act, 1883 (*s*), and we must now notice another kind of privilege, conditional in its nature, afforded by sect. 45 of that Act, which provides, that "where live stock belonging to another person has been taken in by the tenant of a holding to which this Act applies, to be

(*n*) *Keen* v. *Priest*, 4 H. & N. 236.

(*o*) *Keen* v. *Priest*, *supra*.

(*p*) *Piggott* v. *Bertles*, 1 M. & W. 441.

(*q*) *Jenner* v. *Yolland*, 2 Chit. 167.

(*r*) *Davies* v. *Aston*, 1 C. B. 746.

(*s*) *Ante*, p. 145.

Part I. Chap. V.

fed at a fair price, agreed to be paid for such feeding by the owner of such stock to the tenant, such stock shall not be distrained by the landlord for rent, where there is other sufficient distress to be found; and, if so distrained, by reason of other sufficient distress not being found, there shall not be recovered by such distress a sum exceeding the amount of the price so agreed to be paid for the feeding, or if any part of such price has been paid exceeding the amount remaining unpaid; and it shall be lawful for the owner of such stock, at any time before it is sold, to redeem such stock by paying to the distrainor a sum equal to such price as aforesaid, and any payment so made to the distrainor shall be in full discharge as against the tenant of any sum of the like amount which would be otherwise due from the owner of the stock to the tenant in respect of the price of feeding: Provided always, that so long as any portion of such live stock shall remain on the said holding, the right to distrain such portion shall continue to the full extent of the price originally agreed to be paid for the feeding of the whole of such live stock, or if part of such price has been *bonâ fide* paid to the tenant under the agreement, then to the full extent of the price then remaining unpaid."

Live stock agisted for a fair equivalent is within this section, as taken in to be fed at a "*fair price*," and may, therefore, be exempt from distress, even although such equivalent *be not money*. Where cows were agisted on the terms "milk for meat," *i.e.*, that the agister should take their milk in exchange for their pasturage, it was held that the agistment was within the Act (*t*).

Where cattle were distrained on a holding pursuant to an agreement by which the tenant, in consideration of 2*l.*, allowed the owner "the exclusive right to feed the grass on the land for four weeks"; it was held that the cattle

(*t*) *London and Yorkshire Bank* v. *Belton and others*, L. R. 15 Q. B. D. 457.

were not "taken in" by the tenant "to be fed at a fair price" within the above section, and were, therefore, not privileged from distress (*u*); Field, J., observing (*x*)— "The object of this Act, like that of the Lodgers' Goods Protection Act, is to prevent the goods of one man being taken to pay the debt of another, and so far as its policy is concerned, I see no valid distinction between the cases, and no reason why these cattle, just as much as cattle taken on the farm to be agisted, should not be exempt from distress."

The words "fair price" mean "equivalent," and not necessarily money.

By sect. 46, "Where any dispute arises—

"(a) In respect of any distress having been levied contrary to the provisions of this Act; or,

"(b) As to the ownership of any live stock distrained, or as to the price to be paid for the feeding of such stock; or,

"(c) As to any other matter or thing relating to a distress on a holding to which this Act applies;

"such dispute may be heard and determined by the County Court, or by a Court of summary jurisdiction; and any such County Court, or Court of summary jurisdiction, may make an order for restoration of any live stock, or things unlawfully distrained, or may declare the price agreed to be paid, in the case where the price of the feeding is required to be ascertained, or may make any other order which justice requires. Any such dispute as mentioned in this section shall be deemed to be a matter in which the Court of summary jurisdiction has authority by law to make an order, or complaint, in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of such Court of summary jurisdiction under this section may, on giving such security to the other

(*u*) *Masters* v. *Green*, L. R. 20 Q. B. D. 807.

(*x*) At p. 809.

Part I. Chap. V.

party as the Court may think just, appeal to a Court of general or quarter sessions."

An appeal lies from a decision of a County Court judge in the matter of a dispute heard and determined by him under this section, under the general powers of appeal contained in the 13th section of the County Courts Act, 1867 (*y*).

By sect. 48, "An order of the County Court, or of a Court of summary jurisdiction under this Act, shall not be quashed for want of form, or be removed by certiorari, or otherwise, into any Superior Court."

(2.) The instruments of a man's trade or profession.

The instruments of a man's trade or profession are also conditionally privileged, provided there be other sufficient distress on the premises. Thus, the axe of a carpenter and the books of a scholar are not liable to be distrained, if there is other sufficient distress on the premises; and for the same reasons as those given above with regard to beasts of the plough and instruments of husbandry. It seems hardly necessary to observe that when the other goods upon the premises are not sufficient to satisfy the distress, the utensils of trade, and implements of husbandry, may be seized (*z*).

In the case of *Roberts* v. *Jackson* (*a*) the only other chattels on the premises were some lodger's furniture, which the distrainor did not touch, and it was held by Lord Kenyon that under those circumstances it was justifiable to seize implements of trade; his Lordship remarking, "that the distrainor acted humanely in not distraining the goods of the lodger." A learned writer observes that this

(*y*) *Hanmer* v. *King*, 20 Q. B. D. 422. This statute has been repealed by the County Courts Act, 1888.

(*z*) *Wood* v. *Clarke*, 1 Tyr. 314; and see remarks of Lord Lyndhurst, C. B., therein; *Fenton* v. *Logan*, 2 L. J. C. P. 102; *Gorton* v. *Falkner*, 4 T. R. 565; *Nargett* v. *Nias*, 1 Ell. & Ell. 439.

(*a*) 2 Peake, 36.

seems rather a strong case (*b*); but recent legislation has supported this view, and, as will be seen hereafter, ample protection is now afforded to the goods of lodgers (*c*). If a landlord, either expressly or impliedly, consents that chattels placed by a stranger on the tenant's land shall be exempt from distress, a distress by the landlord of such cattle whilst on the land will be unlawful (*d*).

A further change has taken place with regard to this subject by the Law of Distress Amendment Act, 1888 (*e*), which by sect. 4 (following the provisions of sect. 96 of the County Courts Act, 1846 (*f*)), exempts from distress the tools and implements of a man's trade to the value of 5*l*. But this is not to extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded, and where the distress is made not earlier than seven days after such demand. The statute therefore now confers an *absolute* privilege on these articles to the extent mentioned.

III. Things privileged by statute.

(1) Railway rolling stock. Railway Rolling Stock Protection Act, 1872.

A recent statute has protected from distress railway rolling stock when on hire. For by the statute 35 & 36 Vict. c. 50 (The Railway Rolling Stock Protection Act, 1872), it is provided by sect. 3, that "rolling stock (*g*) being in a 'work' (*h*), shall not be liable to distress for rent payable by a tenant of the work, if such rolling stock is not the actual property of such tenant, and has upon it a distinguishing metal plate affixed to a conspicuous part

(*b*) See also *Wilkinson* v. *Ibbett*, 2 F. & F. 300; and *Peppercorn* v. *Hoffman*, 12 L. J. Ex. 270.

(*c*) See *post*, p. 156.

(*d*) *Horsford* v. *Webster*, 1 Cr. M. & R. 696; *Giles* v. *Spencer*, 3 C. B. N. S. 253; *Walsh* v. *Rose*, 6 Bing. 638.

(*e*) 51 & 52 Vict. c. 21. See note (*i*), *ante*, p. 145.

(*f*) Repealed by sect. 188, but re-enacted by sect. 147 of the County Courts Act, 1888.

(*g*) "*Rolling stock*" includes waggons, trucks, carriages of all kinds, and locomotive engines used on railways.

(*h*) "*Work*" includes any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty, in or on which is any railway siding.

thereof, or a distinguishing brand, or other mark conspicuously impressed or made thereon, sufficiently indicating the actual owner thereof." And by sect. 4, "Where any such rolling stock as aforesaid is distrained, a Court of summary jurisdiction may make against the landlord such summary order for restoration of the rolling stock, or for payment of the real value thereof, and respecting costs or otherwise, and may make against the person distraining such order in the matter, and respecting costs, as to the Court seems just."

By sect. 5, "This Act shall not extend to protect from distress the interest which any tenant may have in any rolling stock otherwise protected under this Act, but such interest may be distrained upon by the landlord, and disposed of in the same manner as the whole interest of such tenant, if he had possessed the same; and in case of disagreement between the landlord and the parties claiming such rolling stock, as to the mode of disposing of such interest, the same shall be settled by the Court of summary jurisdiction; and the Court shall, on the application of either party, make such order therein as to the Court shall seem fit."

By sect. 6, "If any party thinks himself aggrieved by any order or adjudication of a Court of summary jurisdiction under this Act, or by dismissal of his complaint by any such Court, he may appeal therefrom, subject to the conditions and regulations following (that is to say)—

"(1.) The appeal shall be made to some Court of general or quarter sessions for the county or place in which the cause of appeal arises, holden not less than fifteen days, and (unless adjourned by the Court of Appeal) not more than four months after the decision of the Court of summary jurisdiction;

"(2.) The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party, and to the Court of summary juris-

diction, of his intention to appeal, and the ground thereof;

"(3.) The appellant shall, immediately after such notice, enter into a recognizance before a justice of the peace with two sufficient sureties, conditioned personally to try such appeal, and to abide the judgment of the Court thereon, and to pay such costs as may be awarded by the Court, or give such other security, by deposit of money or otherwise, as the justice thinks fit to allow."

A locomotive engine which was hired by a railway contractor from the respondents was seized under a distress for rent due from the contractor to the appellants. At the time the engine was seized it was standing in a shed which the contractor rented from the appellants, and which was connected by a siding with the railway. It was held that the engine was "rolling stock" in a "work" within the meaning of sect. 3 of this Act, and was therefore not liable to distress for rent payable by the tenant of the work.

The word "work" in sect. 3 means "any establishment or place used for the purpose of trade or manufacture which is connected by a line of railway by sidings along which the rolling stock may be propelled;" Denman, J., remarking,—"The Act is a general Act to protect railway rolling stock from distraint, and I apprehend that the two general objects of the legislature may probably be considered to have been, to prevent the injustice and mischief which would take place if for a default in payment of rent in respect of land there could be a power on the part of the landlord to do such an infinite mischief to the person who was engaged in the use of engines and carriages working upon railways as would be done by selling them up for default in the payment of rent. I also think the legislature had in its mind the great injustice that would be done to persons letting such valuable property as this upon hire, if when such things are on hire, and are being used for the

purpose of the trade or business of a particular company, or of a particular individual, they could be seized in consequence of a default in payment of rent" (*i*).

(2) Frames, &c., used in woollen manufactories. 6 & 7 Vict. c. 40.

By the statute 6 & 7 Vict. c. 40 (an Act to amend the laws for the prevention of frauds and abuses by persons employed in the woollen, worsted, linen, cotton, flax, mohair, and silk hosiery manufactories; and for the further securing the property of the manufacturers and the wages of the workmen engaged therein), it is enacted, by sect. 18, that "no frame, loom, or machine, materials, tools, or apparatus, which shall be entrusted for the purpose of being used or worked in any of the said manufactures, or any work connected therewith or incidental thereto, or any parts, branches, or processes thereof, whether such frame, loom, or machine, materials, tools, or apparatus shall or shall not be rented or taken by the hire, shall at any time or times hereafter be distrained or seized, or be liable to be distrained or seized, for rent or for debt, or under any execution, or other proceedings whatever, unless the rent be due or the money be owing by the owner of the said frame, loom, or machine, or of the said materials, or tools, or apparatus aforesaid, of any part thereof respectively."

And by sect. 19, "If any landlord or other person, by virtue of any distress warrant, execution, or other proceedings for rent in arrear, or money due, or alleged to be due, by any person whomsoever, shall distrain, seize, carry off, sell, or otherwise dispose of any frame, loom, or machine, materials, tools, or apparatus, belonging to any other person, which shall have been entrusted for the purpose of being used or worked in any of the said manufactures, or any work connected therewith or incidental thereto, or any parts, branches, or processes thereof, and whether the same shall or shall not be rented or taken by the hire, or shall distrain, seize, carry off, sell, or otherwise

(*i*) *Easton Estate and Mining Co.* v. *Western Wagon and Property Co.*, 54 L. T. N. S. 735.

dispose of any materials as aforesaid, or any tools or apparatus as aforesaid, belonging to any other person, and shall refuse to restore possession of all such frames, looms, machines, tools, or apparatus to the person owning, letting, or entrusting the same, when demanded by him, or some person duly authorized by him, of the said landlord or other person, or the person acting as agent or bailiff of such landlord or other person, it shall and may be lawful to and for any justice of the peace, upon complaint on oath before him, to summon the said landlord or other person to appear before any two or more justices of the peace to answer the said complaint, and on proof of the said offence the said justices may thereupon order the property so seized, distrained, carried off, or sold, to be forthwith restored, and issue their warrant to a constable or constables empowering him or them to seize the said property wherever the same shall be found, and deliver possession thereof to the person owning, letting, or entrusting the same, and to levy by distress and sale of the goods of the said landlord or other person, the costs of obtaining the said order, and recovering and obtaining possession of the said property; and in case the said property cannot be found and seized within a time not exceeding twenty-one days, to be limited in the said warrant, or in case the said property shall have been damaged by the same having been distrained, seized, carried off, or sold, then it shall be lawful for such two justices, or any other two justices, on proof thereof (the said landlord or other person having been first summoned by a justice), to issue their warrant to levy by distress and sale of the goods and chattels of such landlord or other person the full value of the said property, or the amount of such damage, as the case may be, together with all costs of recovering and levying the same."

(3) Gas fittings.

By the Gasworks Clauses Act, 1847 (*k*), s. 14, all gas

(*k*) 10 & 11 Vict. c. 15.

Part I. Chap. V.

meters, being the property of a gas company incorporated by Act of Parliament, were absolutely privileged from distress. But this has now been repealed by the Statute Law Revision Act, 1875 (*l*), except so far as incorporated with special Acts. By a case in which the Act of 1847 was incorporated, it was held that a gas stove let for hire was within the words "fittings for the gas," and therefore was not subject to distress. These words apply to all the apparatus used for the consumption and supply of gas (*m*).

(4) Lodgers' goods. Lodgers' Goods Protection Act, 1871.

Another exemption has been created by the recent statute 34 & 35 Vict. c. 79 (The Lodgers' Goods Protection Act, 1871), which, under certain conditions, protects the goods of lodgers from distress by a superior landlord. This statute, after reciting that "whereas lodgers are subjected to great loss and injustice by the exercise of the power possessed by the superior landlord to levy a distress on their furniture, goods, and chattels for arrears of rent due to such superior landlord by the immediate lessee or tenant," enacts that by sect. 1, "If any superior landlord shall levy, or authorize to be levied, a distress on any furniture, goods, or chattels of any lodger, for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff, or other person employed by him to levy such distress, with a declaration in writing (*n*) made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained, or threatened to be distrained upon, and that such furniture, goods, or chattels, are the property, or in the lawful possession, of such lodger; and also setting forth whether any, and what, rent is due, and for what period,

(*l*) 38 & 39 Vict. c. 66.

(*m*) *The Gas Light and Coke Co.* v. *Hardy*, 17 Q. B. D. 619. See also *Gas Light and Coke Co.* v. *Herbert Smith and Co.*, 3 Times Law Rep. 15.

(*n*) For form of Declaration, see App. A. (15); and for Inventory (16).

from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff, or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same, or either of them, to be untrue in any material particular, he shall be deemed guilty of a misdemeanor."

And by sect. 2, "If any superior landlord, or any bailiff, or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid, or tendered to such superior landlord, bailiff, or other person, the rent (if any) which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person, shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices, in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods, or otherwise, as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

By sect. 3, "Any payment made by any lodger pursuant to the first section shall be deemed a valid payment on account of any rent due from him to his immediate landlord."

It will be observed that this Act gives no definition of who is or is not a "lodger"; and this omission has led to a series of decisions, which we will now discuss in detail.

Who is a "lodger."

In *Phillips* v. *Henson* (*o*), it was held that the mere fact of a person being an under-tenant is not sufficient to prevent his being a lodger within the meaning of the Act. So where F., who was tenant of a house under a lease for a term of years, made an agreement in writing with the plaintiff, by which he let to the plaintiff as a quarterly tenant, and at a quarterly rent, certain specified rooms, being all the rooms in such house except three, in which F. resided himself; it was held that such agreement was not inconsistent with the plaintiff's being a "lodger," and as such entitled to the protection given by the Act. In the argument of this case the definition (of a "lodger"), as suggested by Bovill, C. J., in *Thompson* v. *Ward* (*p*), was given, where he says, "Generally speaking a 'lodger' is a person whose occupation is of a part of a house, and subordinate to, and in some degree under the control of, a landlord, or his representative, who either resides in or retains the possession of, or a dominion over the house generally, or over the outer door, and under such circumstances as that the possession of any particular part of the house, held by the lodger, does not prevent the house generally being in the possession of the landlord."

And in the case of *Morton* v. *Palmer* (*q*), it was held that to constitute a person a "lodger" under this Act, there must be evidence of the retention by the immediate landlord, by himself or his servants, of some such dominion, or power, over the house which he sublets, as the master of a house letting lodgings usually has; although it is not absolutely necessary that the immediate landlord should himself reside on the premises so sublet by him. In this case Brett, L. J., remarks, "The statute does not give any

(*o*) L. R. 3 C. P. D. 26.
(*p*) L. R. 6 C. P. 327, 360.
(*q*) 51 L. J. Q. B. D. 7—Court of Appeal.

definition of a 'lodger'; but I am of opinion that the word 'lodger' must be taken to mean a lodger according to the understanding of that word by the majority of persons conversant with the modes of letting and occupying houses in this country to lodgers and under-tenants. The Courts have at various times given some tests which help to decide whether a person is a lodger or an under-tenant. I do not think it is necessary to give an exhaustive definition of the word 'lodger'; but it is clear that, if certain circumstances exist, then a person cannot be held to be a lodger. I will refer to two tests which have been given. The first given by Mr. Justice Maule, in *Toms* v. *Luckett* (*r*), contains the fundamental proposition, which is as follows: "Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet if the owner retains his character of master of the house, the individual so occupying part of it occupies it as a lodger only. It is clear, therefore, that if all that has been done is for the owner or lessee of a house to give a man the use to live in it on certain terms, that man may be a tenant or an under-tenant; but it cannot be said that the lessor has taken him in to lodge with him. It does not follow that if a man has been taken in to lodge with another, he should live at a table, or sleep in the room with that other; he may very well have the exclusive use of part of the house."

A further test was given by Mr. Justice Blackburn in *Allen* v. *The Overseers of Liverpool* (*s*), where he said, "A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though the goods are stowed there"—(by which I understand him to mean, that the rooms may be unfurnished)—"yet he is not in exclusive occupation in

(*r*) 5 C. B. 23. (*s*) L. R. 9 Q. B. 180.

that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servant to look after the house and the furniture, and has retained to himself the occupation"—(that is, of the house)—"though he has agreed to give the exclusive occupation"—(that is, of the rooms)—"to the lodger. It follows, as it seems to me, that the person who takes in another to lodge must retain power in, and dominion over, the house, as the master of the house usually does in this country. It is not absolutely necessary that he should live in or sleep in the house; he may live elsewhere, and yet reserve power in, and dominion over, the house. If, however, he goes away—if he gives up all dealing with the house as master—then I do not think it is possible to say that he takes another person in to lodge with him."

And again, in the case of *Ness* v. *Stephenson* (*t*), it was decided that if the landlord, reserving a room in a house, lets the rest of it to a person, but retains such control and dominion over it as is usually retained by masters of houses let for lodgings, the relation of landlord and "lodger" may exist between the parties within the meaning of the Act, although the lodger has the right of exclusively occupying the greater part of the premises, and has separate and uncontrolled power of ingress and egress, and neither the landlord or his agent sleeps or resides in the house, and the lodger acts as caretaker of the part reserved, the existence of the relationship of landlord and lodger being a question of fact.

But in the recent case of *Heawood* v. *Bone* (*u*), the appellant occupied the first floor and basement of premises at a yearly rent, carrying on the business of a publisher there, but sleeping and residing elsewhere. He had no key of the outer door, which was under the control of his immediate landlord, who admitted him every morning;

(*t*) L. R. 9 Q. B. 245. (*u*) L. R. 13 Q. B. D. 179.

and it was held that the appellant was not a "lodger" within the meaning of the Act. Stephen, J., in his judgment, says:—"We have to say what, upon the whole, we think the statute means by the term 'lodger.' I have come to the conclusion that it meant a 'lodger' in the popular sense of the word, that is, one who sleeps upon the premises. In the ordinary use of language a person of average education would not call the appellant a lodger, because lodging, in the common acceptation, means living and residing at a place; and if you went further, and asked what was meant by living and residence, in general the answer would be that the person fulfilled the description if he slept there, that is, if he undressed and went to bed, staying there till he rose next morning in the usual way. If it is asked why the Act should have meant this rather than anything else, the answer is, that the object was to prevent poor persons from having their homes broken up by distress for rent by the superior landlord."

With regard to the necessary notice to be given under the Act, it was decided, in *Thwaites* v. *Wilding* (*v*), that where the defendant let rooms to the brother of the plaintiff, who let part to the plaintiff, and rent being due from the plaintiff's brother to the defendant, the defendant distrained, and the plaintiff gave notice under the Act, and the distress was withdrawn on the plaintiff's brother paying 1*l.* and agreeing to pay the balance by instalments; and, on no instalments being paid, a second distress was put in, and the plaintiff did not serve another notice, and her goods were distrained; the first notice in accordance with the Act was applicable to the first notice only, and that the plaintiff ought to have served a fresh notice when the second distress was put in. But where rent being due from a tenant to a landlord, the latter put in a distress on the goods of the tenant's lodger in addition to those of the tenant, and these goods were sold before the expiration of

(*v*) L. R. 11 Q. B. D. 421; 12 Q. B. D. 4.

Part I. Chap. V.

five clear days from the distress, contrary to the statute 2 Will. & Mary, sess. 1, c. 5, s. 2 (*x*); it was held, in an action brought by the lodger against the landlord, that he could recover the value of his goods sold, although he served no declaration on the landlord under the Act (*y*). It will be seen in this case that the landlord sold before the expiration of the five days, and so interfered with the rights of the lodger, depriving him of his privileges under the Act. The consequence was that the plaintiff lost his rights to the goods to which he would otherwise have been entitled. It was an illegal act on the part of the landlord by which the lodger suffered damage. In a case where there was an appeal from the refusal of the Queen's Bench Division to grant a rule nisi for a *certiorari* to bring up an order for restoration of goods, on the ground that the justices had no jurisdiction to make the order because the lodger had not stated in her declaration that she was a lodger, and whether, or no, any rent was due from her to her immediate landlord (no rent in fact being due from the lodger); it was held that it was not required by the first section of the Act that the declaration made under that section should state that the declarant was a lodger, and that where no rent was due it was not necessary that the declaration should state anything about rent, the absence of such statement amounting in substance to a statement that no rent was due; and that therefore the declaration was sufficient (*z*).

(5) Law of Distress Amendment Act, 1888. Wearing apparel, bedding, and tools to the value of 5*l*.

Another exemption has recently been conferred by the Law of Distress Amendment Act, 1888 (*a*), by sect. 4 of which it is enacted that "from and after the passing of this Act the following goods and chattels shall be exempt from distress for rent; namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under sect. 96 of the County Courts

(*x*) See *post*, p. 242.

(*y*) *Sharpe* v. *Fowle and Young*, 12 Q. B. D. 385.

(*z*) *Ex parte Harris*, 16 Q. B. D. 130.

(*a*) 51 & 52 Vict. c. 21. This Act does not apply to Scotland or Ireland, and comes into operation after the 31st October, 1888.

Act, 1846, or any enactment amending or substituted for the same, provided that this enactment shall not extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded, and where the distress is made not earlier than seven days after such demand."

County Courts Act, 1846, s. 96, repealed and re-enacted by the County Courts Act, 1888.

By sect. 96 of the County Courts Act, 1846 (*b*), it is enacted that "every bailiff or officer executing any process of execution issuing out of the said County Court against the goods and chattels of any person, may by virtue thereof seize and take any of the goods and chattels of such persons (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade to the value of 5*l.*, which shall to that extent be protected from such seizure)."

It will be observed that no penalty is provided in the new Act for the breach of the above provision. The object of the Act is to protect the poorer classes, and yet, when they apply to a magistrate for summary relief (*c*), on the ground that bedding, &c., has been wrongfully distrained, the only remedy that he can give them is to order a return of the goods on payment of his rent. This might have been provided for by a clause imposing a penalty in such a case (*d*).

It is difficult to understand why the word "expired" should have been used at the end of sect. 4 of the new Act instead of the words "ended or determined" used in the Act of 8 Anne, c. 14. It does not appropriately refer to the determination of a tenancy from year to year by notice to quit. The object of the provision seems to be an inducement to the tenant to give up possession on demand; and if he does not quit within the given time, viz., seven days after demand, the landlord will have a more extended power of distress over his goods.

(*b*) 9 & 10 Vict. c. 95, which has been repealed by sect. 188, but re-enacted by sect. 147 of the County Courts Act, 1888.

(*c*) Under 2 & 3 Vict. c. 71, s. 39, *post*, p. 325.

(*d*) See observations of Mr. De Rutzen, in a case heard at the Marylebone Police Court, on Dec. 9, 1888, in which, also, it was contended that though bedding was privileged from seizure, that did not include the bedstead.

CHAPTER VI.

OF THE PROCEEDINGS IN A DISTRESS FOR RENT.

I. (a) When rent is due.

HAVING now considered the persons who are entitled to distrain, and what things may and may not be distrained, it next becomes necessary to discuss the proceedings to be adopted in carrying out a distress. And before doing so, we propose to examine the precise period at which rent becomes in arrear, and the amount for which a distress may be made.

When in arrear. When a demand should be made.

Rent is due on the morning of the day appointed for payment; but it is not in *arrear* until after midnight (*a*). Just before, and at sunset, is the time when by law a proper demand of it should be made, in order to take advantage of a condition of re-entry (*b*).

Difference between distress and re-entry.

It has been held that a demand of rent should be made such time before sunset as would allow sufficient light to enable the money to be counted; but upon a distress for non-payment of rent a demand on the day is not necessary (*c*), as it is in the case of a re-entry, where the whole interest or estate is defeated, or where any sum "*nomine pœnæ*" is forfeited; in both which cases the demand ought to be made precisely at the day, in the one case in respect of

(*a*) Cole, Ejectment, 413; *Dibble* v. *Bowater*, 2 E. & B. 564; *Cutting* v. *Derby*, 2 W. Bl. 1077; *Leftley* v. *Mills*, 4 T. R. 173; Bac. Abr. tit. Rent.

(*b*) *Duppa* v. *Mayo*, 1 Saund. 287; Woodf. L. & T. 10th ed. 355. But see as to this, Ejectment, *post*, p. 190.

(*c*) *Maund's case*, 7 Rep. 112, cited by Lawrence, J., in *Doe* v. *Wandlass*, 7 T. R. 117; *Thompson* v. *Field*, Cro. Jac. 499; *Fabian and Windsor's case*, 1 Leon. 305; *Tinckler* v. *Prentice*, 4 Taunt. 549; Gilb. Rents, 91; Woodf. L. & T. 10th ed. 355.

the condition, and in the other in respect of the penalty (*d*). The person making the demand must remain on the land till the sun has set, and the demand must be actually continued till that time (*e*). A demand made on the proper day at one o'clock is clearly bad (*f*).

For other purposes, however, the rent becomes due upon the midnight of the day on which it was reserved payable; and therefore if the landlord die before midnight of that day the rent goes to his heir, as an incident to the reversion, and not to his executor, who would have taken it if the deceased had survived the midnight (*g*); but payment to the lessor or his agent on the morning of the rent day is, if the lessor dies before noon, valid as against the heir, though not against the Crown (*h*).

Terms of the contract must be considered.

The period at which rent is considered to be due depends upon the terms of each contract, whether express or implied; and it is often a matter of difficulty to construe the contract rightly: where rent is reserved generally, without the usual mention of half-yearly or quarterly payments, nothing becomes due until the end of the year (*i*). Where, after signing a written agreement for hiring premises at a yearly rent, in which no mention was made of the time when the rent was to be paid, the landlord asked his tenant how he would like to pay his rent, and the tenant replied, "Quarterly," and the rent was paid accordingly quarterly; it was held that the rent was still due annually, although quarterly payments were proved; and that a distress for a quarter's rent was illegal, there being no new terms of letting, and the original agree-

(*d*) See *Thorp* v. *Hurt*, W. N. 1886, p. 96.

(*e*) *Acocks* v. *Phillips*, 5 H. & N. 183.

(*f*) *Doe* d. *Wheeldon* v. *Paul*, 3 C. & P. 613.

(*g*) *Duppa* v. *Mayo*, 1 W. Saund. 287; *Clun's case*, 10 Co. Rep. 127; *Lord Rockingham* v. *Penrice*, 1 P. Wms. 177.

(*h*) *Clun's case*, *supra*.

(*i*) *Cole* v. *Sury*, Latch, 264; *Gray* v. *Chamberlain*, 4 C. & P. 260; *Coomber* v. *Howard*, 1 C. B. 440; Bullen, 105.

ment being unaltered (*j*). Where an agreement was dated the 31st of January, and a person thereby agreed to become tenant "at the customary time of entry" under certain conditions, at a certain rent, to be "paid at the usual time," "as agreed upon," and he entered at Lady-day (the usual time of entry being the 12th of May, and the usual time of rent becoming payable being once a year, at Michaelmas), but the day when the rent was paid being the 8th of January; it was held that this agreement did not necessarily import, in point of law, that the year's rent was to be payable at the end of the year from the time of entry; but that it might be shown from the contemporaneous or subsequent dealings of the parties that their understanding was that the rent should become payable at an earlier period (*k*).

And where A. demised a house to B. for a year certain, with six months' notice to quit, the rent to be paid quarterly or half-quarterly, *if required*, and the landlord received the rent for a certain period quarterly, and on the tenant's quitting before the expiration of a quarter, he distrained for the rent of that half-quarter; it was held that the distress was illegal, as the landlord by requiring the rent quarterly had made his election, and could not distrain for the half-quarter without giving reasonable notice. Under such circumstances the distress was *not* equivalent to a demand (*l*). And where by an agreement, dated on the 8th of September, a house was let for seven years at an annual rent, payable quarterly, the first payment to be made on the 25th of March following; it was held that a quarter's rent only became due on the 25th of March (*m*), and that in effect the payment for the first quarter was postponed until after the end of the term.

(*j*) *Turner* v. *Allday*, 1 Tyrwhitt & Granger, 819; see also *Coomber* v. *Howard*, 1 C. B. 440.

(*k*) *Gore* v. *Lloyd*, 12 M. & W. 463.

(*l*) *Mallam* v. *Arden*, 10 Bing. 299.

(*m*) *Hutchins* v. *Scott*, 2 M. & W. 809.

If rent be reserved quarterly, or half-yearly, each "gale" (*n*) is a distinct debt (*o*); and if a man makes a lease on the 1st day of May, reserving rent payable quarterly, this shall be intended quarterly from the making of the lease; for if the beginning of the quarter should be construed to be any other day than the date of the lease, the lessor would lose the profits of his land for some time, and, consequently, not have quarterly payment made during the continuance of the lease (*p*).

When rent is made payable on certain stated days in the year, it becomes due on the first of the days occurring in point of time, without any regard to the local order of the words (*q*).

Time of grace.

It may sometimes happen that by the terms of the reservation, the tenant has a time of grace given him for the payment of his rent, and that when rent is reserved payable at either of two periods at the election of the lessee, as at the feast of St. Michael, or within one month after (*r*), or at the four usual feasts, or within thirteen weeks after (*s*), it is not considered to be in arrear till after the last period limited for its payment. And where rent was reserved payable at the feast of St. John the Baptist, and at Christmas, or fourteen days after, the first payment to be made at Christmas next after the date, it was decided that the tenant had fourteen days after the first Christmas, as well as every other in which to pay his rent (*t*). But it has been held that, if rent be made payable at Lady-day

(*n*) The periodical payments of rent are called "gales," from "gavel," a rent, or duty. Woodf. L. & T. 10th ed. 343; Spelman's Glossary, voce Cabellum.

(*o*) *Welby* v. *Phillips*, 2 Vern. 129.

(*p*) Gilb. Rents, 50; 2 Roll. Abr. 449, 450.

(*q*) *Hill* v. *Grange*, Plowden, 171.

(*r*) *Pilkington* v. *Dalton*, Cro. Eliz. 575; *Clun's case*, 10 Co. Rep. 127 a; *Blunden's case*, Cro. Eliz. 56; *Thompson* v. *Field*, Cro. Jac. 500; *Josselin* v. *Josselin*, 4 Leon. 19; Bullen, 106.

(*s*) *Clun's case, supra;* Cro. Jac. 309.

(*t*) *Anon.*, 2 Shower, 77.

and Michaelmas, or within ten days after every feast, and the lease expires at Michaelmas, in such a case the last payment becomes due on that day, and before the end of ten days; for the law rejects the ten days after the last Michaelmas out of the term rather than that the lessor should lose the remedy for his rent (*u*).

A covenant that a half-year's rent shall remain in the hands of the tenant till the last year, means the current half-year (*x*)

(b) Rent payable in advance.

It sometimes happens that by the special agreement of the parties to the lease the rent is made payable *in advance*, i. e., *before* the time for which it is to be paid has elapsed; and it would in such case be distrainable as soon as the time specially fixed has elapsed, as there is no objection in point of law to such an agreement. In such cases the rent is not distrained for *before the time of payment has elapsed*, although such time of payment is accelerated, and made to occur earlier than in ordinary cases (*y*); but it should be clearly expressed whether the payment in advance is intended to be of the current quarter from time to time during the whole term, or the first payment only (*z*).

By custom.

This also takes place in some cases by *custom;* as where rent was payable as soon as the half-year began, and the custom being incorporated into the lease gave the landlord a right to distrain immediately (*a*). And where a person entered upon premises subject to the approbation of the landlord, who afterwards did not approve, but upon his

(*u*) *Barwick* v. *Foster*, Cro. Jac. 227, 233, 310; *Bayley* v. *Murin*, 1 Vent. 245; Gilb. Rents, 53; Bullen, 106, 107.

(*x*) *Nichols ats.*——, Lofft, 393.

(*y*) *Lee* v. *Smith*, 9 Ex. 662; *Hopkins* v. *Helmore*, 3 Nev. & P. 452.

(*z*) *Holland* v. *Palser*, 2 Stark. 161; *Hopkins* v. *Helmore*, 8 A. & E. 463.

(*a*) *Buckley* v. *Taylor*, 2 T. R. 600; Bac. Abr. Distress (C.); Smith, L. & T. 3rd ed. 242; *Jenner* v. *Clegg*, 1 Moo. & R. 213; *Lee* v. *Smith, supra; Morton* v. *Woods*, L. R. 3 Q. B. 658; 4 Q. B. 293.

agreeing to pay an advanced rent as well for the time he had been in possession as for the future; it was held that the landlord might distrain for the advanced rent accrued before the agreement as well as for that accrued afterwards (*b*).

Where an execution is about to be put in.

Rent payable in advance may be distrained for by the landlord, although he is aware that an execution is about to be put in at the suit of a judgment creditor (*c*). Where a landlord let premises to a tenant from the 15th of June, for five years, at a yearly rent of 100*l.*, to become due and payable in advance (if demanded) by equal quarterly payments on the 15th of September, December, March, and June every year, and there was a proviso that, if the rent was in arrear for twenty-one days next after any of the days appointed for payment thereof in advance, after the same had been lawfully demanded, and not paid when demanded, then the lessor could re-enter, and no rent was demanded until August, 1852, when upon its not being paid the landlord distrained; it was held that the construction of this demise was that the rent was payable in advance; but was not to be actually paid until demanded, and, therefore, that the landlord was entitled to distrain (*d*). And again, where premises were let under an agreement that the yearly rent should be 110*l.* from the 15th of October, 1847, and that "the rent should be payable in advance if the landlord required the same," and at the expiration of the first quarter the landlord demanded 27*l.* 10*s.* for a quarter's rent then due, and on its not being paid distrained for the 110*l.*; it was held, that after such demand he had a right to distrain for the 27*l.* 10*s.*, but not for the 110*l.* (*e*).

(*b*) *M'Leish* v. *Tate*, Cowp. 781; *Tracey* v. *Talbot*, 6 Mod. 214.

(*c*) *Harrison* v. *Barry*, 7 Price, 690.

(*d*) *Williams* v. *Holmes*, 8 Exch. 861.

(*e*) *Clarke* v. *Holford*, 2 C. & K. 540.

Part I. Chap. VI.

It was a condition in a lease of a farm that the tenant should pay the last half-year's rent in advance, which last half-year's rent should be considered as reserved and due on the 29th of September preceding, if the landlord should see cause for such demand. It was held that the landlord was entitled to demand the last half-year's rent, and to distrain for it at any time between the 29th of September and the expiration of the tenancy without demand previous to the 29th of September (*f*). But where B. having leased his land to the plaintiff at a rent payable quarterly, and subsequently mortgaged the lands to the defendants, who allowed B. to remain in the receipt of the rent, and subsequently to the mortgage B. applied to the plaintiff (who was not aware of the mortgage) to pay him a year's rent in advance, and the plaintiff did so, and after the payment, and before the rent had become due, the defendants gave notice to the plaintiff to pay the rent to them, and on the plaintiff refusing to pay the defendants distrained for it; it was held that payment of the rent before it became due was not a good payment as against the defendants (the mortgagees), and that as the plaintiff was still liable to pay them the rent, the defendants were justified in distraining (*g*).

Rent payable on a condition precedent.

Where rent is payable only on a condition precedent, it does not become due until that condition is fulfilled. So in the case of *Mechelan* v. *Wallace* (*h*), where a furnished house was hired at a yearly rent for the house and furniture, and the tenant took possession, when it was furnished only in part, under an agreement that it should be completely furnished, though no time was specified; it was held that the reservation was conditional, and no rent became payable till the remainder of the furniture was sent in.

(*f*) *Witty* v. *Williams*, 10 L. T. N. S. 457.

(*g*) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589.

(*h*) 7 A. & E. 54, n.; see also *Regnart* v. *Porter*, 7 Bing. 451.

(c) The amount for which a distress may be made.

With respect to the amount of rent for which a distress may be made, it seems, that it must depend upon the terms of the reservation or grant; and according to such terms, whatever can be considered as an ascertained part of the rent in arrear may be distrained for. But care must be taken that the distress is not made for more rent than is really owing. In case of doubt the landlord's safest course is to distrain for all that he claims, though, as it may turn out subsequently, a less amount was really owing (*i*); for it was held (*k*) that where the defendants wrongfully seized goods of the plaintiff as a distress, and afterwards wrongfully sold the goods, although only a small part of the amount claimed was due, the mere taking or selling of more than was due was not actionable, unless it appeared from the evidence that the goods seized and sold were excessive with reference to the amount of the actual arrears. The proper course, as will be seen hereafter, is for the tenant to tender the amount really due, and if the landlord refuses to accept that sum, try the disputed question of amount in an action of replevin (*l*).

Distress must not be made for more rent than is due.

In cases of doubt.

The best course to be taken.

In cases where different properties are included in the same lease a difficulty sometimes arises, whether the rent reserved on all the properties is an entire rent, or whether it must be apportioned to the several properties (*m*). Amounts severally accruing under separate demises must not be united in a single distress, even where two separate demises are contained in the same deed (*n*), or where the

Where different properties are included in the same lease.

(*i*) Woodfall, L. & T. 10th ed. 418.

(*k*) *Tancred* v. *Leyland*, 16 Q. B. 669 (overruling *Taylor* v. *Henniker*, 12 Ad. & Ell. 488); see also *Crowder* v. *Self*, 2 Moo. & R. 190; *Glyn* v. *Thomas*, 11 Ex. 870; *French* v. *Phillips*, 1 H. & N. 564; *Loring* v. *Warburton*, E. B. & E. 507.

(*l*) *Glyn* v. *Thomas*, *supra*.

(*m*) Gilb. Rents, 34; *Winter's case*, 2 Roll. Abr. 448; *Tanfield* v. *Rogers*, Cro. Eliz. 340; *Lee* v. *Arnold*, 4 Leon. 27; *Hill's case*, 4 Leon. 187; *Knight's case*, Moore, 202; Bullen, 109.

(*n*) *Rogers* v. *Birkmire*, Rep. Temp. Hardw. 245; *Tanfield* v. *Rogers*, *supra*; Bullen, 110.

Part I. Chap. VI.

tenant holds under one demise, and afterwards his possession is continued under another (*o*). Where the rent distrained for consists of several amounts which fall due at different times, several distresses must be made for it (*p*). Thus, where in an action of excessive distress the defendant pleaded that the whole sum distrained for was in arrear; it was held that he was not precluded from insisting on certain arrears by the fact that since they became due *other* arrears had become due and had been distrained for, although the first warrant of distress stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears then in question accrued, and although on the second distress the defendant stated that it was for rent due since the last distress (*q*). But where the rent is entire, the whole amount due must be distrained for at once, if sufficient goods can be found upon the premises, for "a man who has an entire duty shall not split the entire sum, and distrain for one part of it at one time, and for the other part of it at another time, and so *toties quoties* for several times" (*r*). An action will, therefore, lie against a landlord for goods taken on a second distress, where he might have taken sufficient on the first, or where he has voluntarily abandoned it (*s*).

Where the rent consists of several amounts.

Where rent is entire.

Bagge v. *Mawby*.

The decisions on this point were fully discussed in the case of *Bagge* v. *Mawby* (*t*), where a landlord distrained upon the goods of a tenant who had previously committed an act of bankruptcy. Before any sale took place the landlord withdrew the distress without obtaining payment

(*o*) *Stanfield* v. *Hicks*, Lord Raymond, 280; see also *Legg* v. *Strudwick*, 2 Salk. 414; *Birch* v. *Wright*, 1 T. R. 380.

(*p*) *Palmer* v. *Strange*, 1 Lev. 43; Bullen, 110.

(*q*) *Gambrell* v. *Earl of Falmouth*, 4 Ad. & Ell. 73; 5 Ad. & Ell. 403.

(*r*) *Hutchins* v. *Chambers*, 1 Burr. 589, cited in *Owens* v. *Wynne*, 4 El. & Bl. 579; *Wallis* v. *Saville*, 2 Lutw. 1536; *Lear* v. *Caldecott*, 4 Q. B. 123.

(*s*) *Smith* v. *Goodwin*, 4 B. & Ad. 413; *Dawson* v. *Cropp*, 1 C. B. 961.

(*t*) 8 Ex. 641; *Lear* v. *Caldecott*, 4 Q. B. 123.

of the rent, owing to a notice from one of the creditors of the tenant that he was taking proceedings in bankruptcy against him; but at that time no assignee had been appointed. The landlord afterwards distrained a second time for the same rent. The Court held that as he had abandoned the first distress on account of a mere threat, which he ought to have disregarded, and without any sufficient excuse, the second distress was illegal: "There is nothing more clear," said Baron Parke, in delivering judgment, "than this, that a person cannot distrain twice for the same rent; for if he has had an opportunity of levying the amount of the first distress, it is vexatious in him to levy the second, unless there be some legal ground for his adopting such a course. . . . If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder; or, if the tenant has done anything equivalent to saying, 'Forbear to distrain now, and postpone your distress to some other time'; in such cases the landlord may distrain a second time. But if there is a fair opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first distress, and he cannot distrain again."

Where no sufficient goods on the premises.

If the entire sum due be distrained for, and there be not sufficient goods found upon the premises, or the distrainor makes a mistake in the value of the goods seized, he may afterwards complete his remedy by making a second seizure (*u*); if a person were not permitted under such circumstances to distrain a second time it might reduce him to the necessity of taking effects of great value on the first seizure, and this would be far more prejudicial

(*u*) *Hutchins* v. *Chambers*, *supra*; *Wallis* v. *Saville*, *supra*.

Part I. Chap. VI.

to the tenant than to allow a second distress to be made (*x*).

(d) Deductions from rent.

It sometimes happens that the amount of rent for which a tenant is liable, is capable of being reduced by payments which he has been forced to make on behalf of his landlord, which payments were properly charged on the land and ought to have been paid by the landlord himself.

In such a case the tenant is considered to have been authorized by the landlord to make such payments, and is allowed to treat the same as having been made in satisfaction, or part satisfaction of his rent. So where A., who rented a vault, which he sub-let to D. from year to year, became bankrupt, his sub-lessee, D., owing him 90*l.* for rent, and the superior landlord distrained upon D.'s goods for rent due from A.; it was held that a tenant who has been compelled by a superior landlord to pay ground-rent and such-like charges, may treat such payment as having been made in satisfaction of rent due to his immediate landlord, Rolfe, B., remarking, that "the principle on which those cases rests is this. The immediate landlord is bound to protect his tenant from all paramount claims; and, therefore, when the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments, which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due" (*y*).

And in like manner where defendants rented a mine, and the plaintiffs sub-rented the same from the defendants, and the superior landlord distrained on the plaintiffs' sub-lessee for rent due to him from the defendants; it was held that the amount realized by the distress was a satisfaction "*pro tanto*" of the rent due by the sub-lessee

(*x*) Per Lord Mansfield in *Hutchins* v. *Chambers*, *supra*.

(*y*) *Graham* v. *Allsopp*, 3 Ex. 186; *Jones* v. *Morris*, 18 L. J. Ex. 477.

to the defendants; and this is so, not only when the sub-lessee pays out the distress, but also where goods belonging to him are sold under the distress (*z*). And where a tenant was compelled to pay an annuity charged upon the land, it was held that it was a good answer to the landlord's demand for rent, that before the landlord had anything in the premises, a rent-charge had been granted out of the land, that it was in arrear, and that the tenant under threat of a distress had been compelled to pay it (*a*).

When tenant may make deductions.

In fact, wherever a tenant may be ousted from his occupation on default made of a payment by his landlord he may pay in his discharge, and for the redemption of the premises, and deduct such payment from his rent (*b*), although the superior landlord may not have actually threatened to distrain, but has only demanded the rent, or allowed the occupying tenant time to pay (*c*).

Whenever any such payments are made on behalf of the landlord, they should be deducted from the rent of the current year, for the tenant will be able to derive no future advantage from them, if, instead of treating them as payments of so much of his rent already in arrear, he allow them to accumulate and pay his rent in full in the meantime (*d*).

Where a person was employed to prepare a statement of a debtor's affairs, and on the landlord threatening a distress for rent he paid the amount due upon the creditors' instructions, and a receiving order was subsequently made against the debtor; it was held that under the circum-

(*z*) *O'Donoghue* v. *Coalbrook Co.*, 26 L. T. N. S. 806; *Sapsford* v. *Fletcher*, 4 T. R. 511; *Wheeler* v. *Branscombe*, 5 Q. B. 373.

(*a*) *Taylor* v. *Zamira*, 6 Taunt. 524.

(*b*) *Smith* v. *Pearce*, Woodfall, L. & T. 10th ed. 361, note (*q*).

(*c*) *Carter* v. *Carter*, 5 Bing. 406; *Valpy* v. *Manley*, 1 C. B. 594; *Taylor* v. *Zamira*, *supra*; see also *Johnson* v. *Jones*, 9 A. & E. 809; *Dyer* v. *Bowley*, 2 Bing. 94; *Wilton* v. *Dunn*, 17 Q. B. 294.

(*d*) Bullen, 113.

Part I. Chap. VI.

stances, and looking to the fact that a majority of the creditors in number and value were of opinion that the payment was beneficial and should be refunded, repayment ought to be allowed, but that the official receiver was entitled to deduct the costs of the hearing from the amount (*e*).

Property tax.

Property tax, being payable by the landlord notwithstanding any contract, if it be paid by the tenant it may be deducted from his rent (*f*). The same rule applies to payments such as land tax, sewers rate, tithe rent-charge, &c. (*g*); but such deductions must be made from the next rent due after such payment, as they cannot afterwards be retained or recovered by action from the landlord (*h*); nor can they be retained until they have been actually paid. Therefore, where under the Metropolitan Local Management Act, 1862 (*i*), which enacts that "a vestry may give notice to the occupier of a house to pay to them paving expenses, &c., owed them by the owner, and the occupier is entitled to deduct the amount which he is forced to pay from the rent which he owes to the owner, as it becomes due," and the vestry served an occupier with a notice to pay them certain sums under the Act, and at the time the occupier owed his landlord one quarter's rent, and he told his landlord of the notice, and on a distress being levied by the landlord for the quarter's rent, he paid the vestry *part* of the amount due for the paving expenses, and showed the receipt to the bailiff, who then withdrew; it was held that the landlord's right of distress was only taken away on

(*e*) *Ex parte Covering, In re Ayshford*, 35 W. R. 652.

(*f*) *Franklin* v. *Carter*, 1 C. B. 750; *Saunderson* v. *Hanson*, 3 C. & P. 314; *Carter* v. *Carter*, *supra*.

(*g*) *Palmer* v. *Earith*, 14 M. & W. 431; Redman & Lyon, L. & T. 2nd ed. 131.

(*h*) *Lumming* v. *Bedborough*, 15 M. & W. 438; *Andrew* v. *Hancock*, 1 B. & B. 37; *Stubbs* v. *Parsons*, 3 B. & Ald. 516; *Saunderson* v. *Hanson*, 3 C. & P. 314; *Spragg* v. *Hammond*, 2 B. & B. 59.

(*i*) 25 & 26 Vict. c. 102, s. 96.

actual payment by the occupier of the *whole amount* of the paving expenses; and that in this case, as the tenant had only paid part of that amount, he was not protected by the Act, and therefore the distress was justifiable (*j*). Payment of rent under a distress is not a conclusive admission of title in the distrainor, but may be rebutted by showing that he never had any title (*k*).

Agricultural Holdings (England) Act, 1883.

By sect. 47 of the Agricultural Holdings (England) Act, 1883 (*l*), it is enacted, that where the compensation due under this Act, or under any custom or contract, to a tenant, has been ascertained before the landlord distrains for rent due, the amount of such compensation may be set off against the rent due, and the landlord shall not be entitled to distrain for more than the balance.

(e) Double rent. 11 Geo. 2, c. 19, s. 18.

In one case landlords are entitled to distrain for double the amount of rent reserved under the statute 11 Geo. II. c. 19, s. 18, which, after reciting "that great inconveniences happen to landlords, whose tenants have power to determine their tenancies by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession, when the landlord has agreed with another tenant for the same," enacts, "that in case any tenant or tenants shall give notice to his or their landlord of his or their intention to quit the premises at a particular time, and shall not deliver up possession accordingly, he or they shall pay to his landlord *double the former rent*, for the whole time he or they shall hold the premises after the expiration of such notice; and that such double rent shall be levied, sued for, and recovered, as the former single rent might have been."

(*j*) *Ryan* v. *Thompson*, 37 L. J. C. P. 134; Redman & Lyon, L. & T. 2nd ed. 145. And a mere set-off or payment, which cannot be proved to be a distinct appropriation of the rent itself, is not sufficient; Bullen, 114.

(*k*) *Knight* v. *Cox*, 18 C. B. 645.

(*l*) 46 & 47 Vict. c. 61.

Part I. Chap. VI.

To what the Act applies.

This Act only applies where the tenant has given a notice binding upon him to quit upon the expiration of the term specified in the notice, and upon which the landlord might at that time act and bring ejectment (*m*); so that if the notice is too vague it is not within the Act (*n*).

The notice to quit need not be in writing (*o*).

Recovery in the County Court.

Double rent may be recovered by distress or by action; and where the amount claimed does not exceed 50*l.* it may be recovered in the County Court (*p*).

(f) Effect of Statutes of Limitation.

The landlord may lose his right to distrain by the lapse of time.

3 & 4 Will. 4, c. 27, s. 42.

By 3 & 4 Will. IV. c. 27, s. 42, it is enacted, that "No arrears of rent, or interest in respect of money charged on rent, or damages in respect of arrears, shall be recovered by distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

To what this section applies.

This section applies only to rents reserved on ordinary leases (*q*). But although only six years can be recovered by distress, *twenty years'* arrears may sometimes be recovered in an action of covenant or debt (*r*).

38 & 39 Vict. c. 57, s. 1.

By 38 & 39 Vict. c. 57, s. 1 (which repeals sect. 2 of 3 & 4 Will. IV. c. 27), it is provided that no person shall

(*m*) *Johnstone* v. *Huddlestone*, 4 B. & C. 922; see also *Humberstone* v. *Dubois*, 10 M. & W. 765.

(*n*) *Farrance* v. *Elkington*, 2 Camp. 591; Bullen, 116.

(*o*) *Timmins* v. *Rowlinson*, 3 Burr. 1603.

(*p*) *Wickham* v. *Lee*, 12 Q. B. 521.

(*q*) *Humphrey* v. *Gery*, 7 C. B. 567; *Manning* v. *Phelps*, 10 Ex. 59.

(*r*) 3 & 4 Will. 4, c. 42, s. 3. This statute, however, only refers to debts on covenant, and does not mention distresses; see *Hunter* v. *Nockold*, 1 Mac. & Gor. 640; *Paget* v. *Foley*, 2 Bing. N. C. 679; *Strachan* v. *Thomas*, 12 A. & E. 536.

make an entry or distress, or bring an action to recover any land or rent, but within twelve years next after the right of entry, distress, or action has first accrued.

This section is substantially the same as sect. 2 of 3 & 4 Will. IV. c. 27, but the decisions on the latter section are still applicable. So it does not apply to rents reserved on a demise, but to rents where a distinct estate may be had, independently of any title to the land out of which the rent issues; as, for example, an ancient quit-rent, and a fee-farm rent reserved in letters patent (*s*).

By sect. 34 of 3 & 4 Will. IV. c. 27, it is enacted that at the determination of the period limited by this Act to any person for making an entry or distress, the right and title of such person to the land for the recovery whereof such distress might have been made or brought within such period shall be extinguished (*t*).

Where a rent-charge had been received from the occupier of one part of the premises charged down to a recent period, and then for the first time a distress was levied on the occupier of another part, which for more than twenty years had been in a separate ownership, and the owner or occupier of which had never before paid any of the rent; it was held, that the right to distrain for the rent on that part of the premises charged was not barred by the 3 & 4 Will. IV. c. 27 (*u*).

The only way, it seems, in which the repealed section or the substituted section now in force can affect the right of making a distress, is by its operation in destroying the

(*s*) *Grant* v. *Ellis*, 9 M. & W. 113; *Paget* v. *Foley*, *supra*; *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328; *Dean of Ely* v. *Cash*, 15 M. & W. 617; *Owen* v. *De Beauvois*, 5 Exch. 166. See also *Irish Land Commission* v. *Grant*, 52 L. T. N. S. 228; and *Esdaile* v. *Payne*, 13 App. Cas. 613.

(*t*) See *Lyell* v. *Kennedy*, 18 Q. B. D. 807.

(*u*) *Woodcock* v. *Titterton*, 12 W. R. Q. B. 685; Woodfall's L. & T. 10th ed. 409.

Part I. Chap. VI.

right to recover the land itself after the period of limitation which it mentions (*x*).

Distinction between sect. 2 and sect. 42 of 3 & 4 Will. 4, c. 27.

The distinction between sect. 2 and sect. 42 of the 3 & 4 Will. IV. c. 27, is well illustrated in the case of *James* v. *Salter* (*y*), which referred to the arrears on an annuity created by will, and in which Tindal, C. J., says: "Now upon reference to the statute 3 & 4 Will. IV. c. 27, it appears to have provided two distinct periods of limitation, within which all distresses for arrears of annuities must be made, the two periods being prescribed in respect of *claims and objects in their own nature perfectly distinct.*

"The 2nd section contemplates and provides for the case where the *right or title* to the annuity itself is disputed. The 42nd section contemplates and provides for the case where the title to the annuity is not disputed, but the distress is made *for the arrears due.*"

Agricultural Holdings (England) Act, 1883.

By the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), which came into force on the 1st of January, 1884, certain important provisions are made with regard to the right to distrain for the rent of any holding to which that Act applies.

By sect. 54, "Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

By sect. 44 it is enacted, that "*after* the commencement of the Act it shall not be lawful for any landlord entitled to the rent of any holding to which this Act applies to distrain for rent, which became due in respect of such holding more than one year before the making of such

(*x*) Sm. L. & T. 3rd ed. p. 209.

(*y*) 2 Bing. N. C. 505; see also *Strachan* v. *Thomas*, 12 A. & E. 536.

distress, except in the case of arrears of rent in respect of a holding to which this Act applies existing at the time of the passing of this Act, which arrears shall be recoverable by distress up to the first day of January, 1885, to the same extent as if this Act had not passed.

"Provided that, where it appears that according to the ordinary course of dealing between the landlord and tenant of a holding the payment of the rent of such holding has been allowed to be deferred until the expiration of a quarter of a year or half a year after the date at which such rent legally became due, then for the purpose of this section the rent of such holding shall be deemed to have become due at the expiration of such quarter or half-year as aforesaid, as the case may be, and not at the date at which it legally became due."

It was held that under the proviso of this section a landlord can distrain for all rent which his agreement with his tenant made payable within the year preceding the distress, both what was due more than a year before the distress, but which was collected within the year, and also that which was due within the year, but collected at a date subsequent to the distress, and that, too, although the whole amount was more than one year's rent (*z*).

(g) Demand of rent previous to a distress.

No demand is necessary, as a general rule, before making a distress: for it is the duty of the tenant to pay or tender his rent when due to his landlord, and the very fact of the distress is considered as a legal demand of such rent. This applies where there is a clause in the lease that the lessor may distrain "if the rent is not paid, *being lawfully demanded*" (*a*).

(*z*) *Re Bew, Ex parte Bull*, 18 Q. B. D. 642.

(*a*) *Browne* v. *Dunnery*, Hob. 208; *Kind* v. *Ammery*, Hutton, 23; *Mallam* v. *Arden*, 10 Bing. 299; Bac. Abr. 5th ed. vol. vi. (1), tit. "Rent"; Woodfall's L. & T. 10th ed. p. 289.

Power of distress granted *after* demand.

When a demand is necessary.

But where the power of distress is granted *after demand*, or, the rent being demanded "off the land," or "of the tenant personally," a demand in such cases is necessary before a distress can be made (*b*). So where A. demised a house to B. for a year certain, with six months' notice to quit, the rent to be paid quarterly or half-quarterly if required, and the landlord received the rent for a certain period *quarterly*, and on the tenant's quitting before the expiration of a *quarter*, he distrained for the rent of that *half-quarter;* it was held that the distress was illegal, as the landlord, by receiving the rent quarterly, had made his election, and could not distrain for the half-quarter without giving reasonable notice. Under such circumstances the rent was *not* equivalent to a demand (*c*). Where the rent is reserved payable on a certain day, and the tenant is ready on the land to pay it, but the landlord is not there to receive it, the rent still remains due, and the landlord may still distrain for it on making a subsequent demand.

So, also, where the tenant tenders the rent to the landlord, he cannot distrain for it without a previous demand (*d*).

The same rules apply with respect to rent-charges as to those of rent-service (*e*).

We have already noticed the distinction between a distress for non-payment of rent, and a re-entry, with regard

(*b*) *Browne* v. *Dunnery*, Hob. 208; *Kidwelly* v. *Brand*, Plowd. 69.

(*c*) *Mallam* v. *Arden*, 10 Bing. 299. As to demand for a sum *nomine pœnæ*, see *ante*, p. 164.

(*d*) Bac. Abr. 5th ed. vol. vi. (1), tit. "Rent"; *Cranley* v. *Kingswell*, Hob. 207; *Horne* v. *Lewin*, Lord Raymond, 639, 641; *Maund's case*, 7 Co. Rep. 28; *Pim* v. *Greville*, 6 Esp. 95; Bullen, 119.

(*e*) *Maund's case*, *supra;* see also as to demand of rent, *Perryman* v. *Bowden*, Het. 59; *Fox* v. *Vaughan*, Het. 86; *Dethick* v. *Brodhorn*, 2 Sid. 110, 117; *Dennis* v. *Bosden*, 1 And. 253; *Wicks* v. *Dennis*, 1 Leo. 190; *Swynerton* v. *Mills*, Br. & G. 178; Bullen, 119, note 9.

to a demand. In the case of a re-entry, a demand is necessary (*f*), unless dispensed with (*g*).

A demand of a certain sum, made up of two sums claimed on two distinct grounds, is not a "demand" of either; therefore, where a railway company, entitled to distrain for tolls, demanded a sum in gross made up of two sums, the one due for tolls, the other not so due, and the party tendered the amount due for tolls, as being all that was due; it was held that the company were not entitled to distrain; Watson, B., remarking, "that before they could distrain for the toll they must have demanded the toll" (*h*).

A lease of a colliery contained a proviso that if and whenever any part of the rents and royalties thereby reserved should be in arrear for thirty days after the same "shall have been legally demanded," the lessors might enter upon the demised premises or any part thereof, and might seize and distrain any machinery thereon, or in, upon, or about any buildings or land wherever the same might be used for the working of the mines; and the lease also contained a proviso for re-entry for non-payment of rents or royalties for the space of three calendar months after the same "shall have been lawfully demanded." The lessor distrained for arrears of rent the goods and chattels in and upon land used in connection with the colliery, and which were not comprised in the lease, having previously made many demands for such arrears both by letter and verbally, more than thirty days before the distress was levied. The question was whether the words "legally demanded" meant that the demand was to be made according to the strict rules of the common law. It was held that the strict rules of the common law, with respect to a formal demand for rent, need not be

(*f*) But see as to this, Ejectment, *post*, p. 190.

(*g*) See *ante*, p. 164.

(*h*) *Field* v. *Newport Railway Company*, 27 L. J. Ex. 396.

followed to enable the landlord to exercise his power of distraint (*i*).

II. (a) Distress when to be made as to time.

It is another rule, that a distress cannot be made in the night-time. It must be *between sunrise and sunset* (*k*).

Must be made between sunrise and sunset.

This is of very ancient origin, and the reason given seems to be, because otherwise the tenant would have no opportunity to make a tender of the amount due, which he might possibly have done to avoid the distress (*l*).

A distress for rent before sunrise, or after sunset, is illegal, although it is not dark at the time.

Time when sunrise and sunset take place.

Some doubt has been felt as to the exact time when sunrise and sunset take place (*m*), Baron Martin observing, "that the rule is, for people to distrain in the day-time, and not run it very fine between sunrise and sunset. But, although there may be circumstances under which it may be difficult to determine what will be the proper evidence of sunrise or sunset, yet ordinarily the time by the clock, coupled with the Almanack, will be *some* evidence, and if unanswered sufficient; and if by such evidence it clearly appears that in any view the distress was before the sun had risen, or after it had set, the distress will be illegal." Therefore, where a distress was taken about eight o'clock, and by the Almanack the sun set just after seven, and in another case it was taken between two and three o'clock in the morning (on which day by the Almanack the sun rose at half-past four), and there was no other evidence on the point; it was held, that in both cases the evidence was *sufficient* to find the distresses illegal (*n*).

(*i*) *Thorp* v. *Hurt*, W. N. 1886, p. 96.

(*k*) *Tutton* v. *Darke*, 5 H. & N. 647; *Nixon* v. *Freeman*, *ibid.*; Sm. L. & T. 3rd ed. 243.

(*l*) Co. Litt. 142 a; *Aldenburgh* v. *Peaple*, 6 C. & P. 212.

(*m*) See Gilb. on Distress, 49; "Mirror" for meaning of word "night"; Year Books, 11 Hen. 7, 10 Edw. 3, p. 21, pl. 37; Doctor and Student, chap. 9, p. 128; 4 Black. Com. 422.

(*n*) *Tutton* v. *Darke*, 5 H. &

(b) Distress after expiration of tenancy.

It was a rule at common law that a landlord could not distrain after the determination of the tenancy; for thereby the privity of estate was destroyed (*o*), even though the tenant continued in occupation (*p*). To remedy this it was provided by the statute 8 Anne, c. 14, ss. 6, 7, that "any person having rent in arrear, or due upon any lease for life or lives, or for years, or at will, ended or determined, might distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease had not been ended or determined; provided that such distress be made within six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

8 Anne, c. 14, ss. 6, 7.

Before this statute was passed, if rent had been reserved payable at Lady-day and at Michaelmas, the landlord would have lost his remedy by distress for his last half-year's rent; for he could not have distrained for it before it was due, and it would not have become due till the last moment of Michaelmas-day, when the term would have been at an end. In consequence of this, it was usual, in Lord Coke's time, to reserve the last quarter's rent in advance (*q*). It has been decided upon this statute that when a tenant by his landlord's permission held over part of the demised premises after the tenancy had expired, the landlord might distrain on that part within six months after the expiration of the tenancy, the statute not being confined to a tortious holding over, or to the holding

Decisions on the statute.

N. 647; *Nixon* v. *Freeman*, *ibid.*; see also *Collier* v. *Nokes*, 2 C. & K. 1013; *Lamb* v. *Wall*, 1 F. & F. 503; *Edmondson* v. *Nuttall*, 17 C. B. N. S. 280; *Attack* v. *Bramwell*, 3 B. & S. 520; *Dibble* v. *Bowater*, 2 E. & B. 564.

(*o*) *Pennant's case*, 3 Co. Rep. 64; Bro. Dist. pl. 74; 1 Inst. 47 b; Bradby, 90; *Tutter* v. *Fryer*, Winch. 7.

(*p*) *Williams* v. *Stiven*, 9 Q. B. 14.

(*q*) Co. Litt. 47 b; Sm. L. & T. 3rd ed. p. 246.

over of the whole premises (*r*). But where a tenant of a farm, having remained a few days after the expiration of his term, and after entry by a new tenant, went away leaving a cow and some pigs, but giving no further intimation of any intention of returning or continuing to hold any part of the farm; it was held that this did not constitute a possession sufficient to justify the landlord in distraining the cow and pigs so left for arrears of rent (*s*).

Custom of the country.

Where by the custom of the country (*t*), or the agreement of the parties (*u*), the tenant leaves his away-going crop in the barns, or stacked on the premises, after the determination of his term, but within the time allowed by the custom of the country for the outgoing tenant to get in and dispose of his crop, it may be distrained by the landlord for arrears remaining due, although six months have elapsed since the expiration of the lease; for this additional period is considered as a prolongation of the tenancy, and not a mere continuance in possession. The custom is, in fact, a tacit agreement between the parties, that the contract between them shall continue until a certain time; and therefore, until such time, it must continue with all its original rights and properties (*x*).

Succeeding landlord under 14 & 15 Vict. c. 25, s. 1.

A landlord who succeeds on the death of the previous landlord, and who is entitled by sect. 1 of 14 & 15 Vict. c. 25, to receive a proportion of rent from the tenant in lieu of emblements, may recover such rent by distress (*y*).

And where the original tenant dies before the expiration of his term, and his administrator continues in possession during the remainder, and after the expiration of it,

(*r*) *Nuttall* v. *Staunton*, 4 B. & C. 51.

(*s*) *Taylorson* v. *Peters*, 7 A. & E. 110.

(*t*) *Beavan* v. *Delahey*, 1 H. Black. 5; *Lewis* v. *Harris*, *ibid.* 7, n. a; *Griffiths* v. *Puleston*, 13 M. & W. 358.

(*u*) *Knight* v. *Bennett*, 3 Bing. 364; *Boraston* v. *Green*, 16 East, 81.

(*x*) Bullen, 121.

(*y*) *Haines* v. *Welch and Marriott*, L. R. 4 C. P. 91.

a distress may be taken for the rent due for the whole term (*z*).

But where a mortgagor agreed to become tenant to the mortgagees during their will at a rent, subject to powers of distress and entry, and the mortgagor died leaving his widow in possession; it was held that the deed created only a tenancy at will, and no distress could be made on the goods, because not only the tenancy, but also the possession of the tenant from whom the arrears became due, had ceased (*a*).

Where the defendant, as sheriff, on behalf of an execution creditor, seized the goods of the tenant whilst in possession within six months after the determination of his lease, and caused the goods to be sold, and the proceeds given to the creditors, without satisfying the arrears of rent due to the plaintiffs as landlords; it was held, that the landlord's right to a year's rent under the first section of the 8 Anne, c. 14, ceased upon the determination of the lease, although by sections 6 and 7 of that statute he retained a power of distress for six months afterwards (*b*).

Where the plaintiff occupied a house as tenant to the defendant, the term expiring on the 29th September, and he removed his goods from the premises on the 27th, 28th and 29th of September, and on the 18th of October the defendant seized the goods off the premises as a distress for rent; it was held, that the defendant was not entitled to seize the goods off the premises under the 11 Geo. II. c. 19, s. 1 (*c*), unless he could have seized the same goods under the 8 Anne, c. 14, s. 7, if they had remained on the premises; and as by the 8 Anne, c. 14, goods can only be seized during the possession of the tenant, the seizure was wrongful (*d*).

Seizing goods off the premises.

(*z*) *Braithwaite* v. *Cooksey*, 1 H. Black. 465.

(*a*) *Turner* v. *Barnes*, 2 B. & S. 435.

(*b*) *Cox* v. *Leigh*, L. R. 9 Q. B. 333.

(*c*) *Post*, p. 196.

(*d*) *Gray* v. *Stait*, L. R. 11 Q. B. D. 668.

Part I. Chap. VI.

To what the statute applies.

The statute applies only to cases where the tenancy has been determined by lapse of time, or perhaps by notice to quit, but not to cases where it has been put an end to by the tenant's own wrongful disclaimer (*e*).

A lessor who lets to an under-tenant cannot after the term has expired enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays him under threat of distress, although the under-tenant still retains the possession (*f*).

The provision of the statute 8 Anne, c. 14, ss. 6 and 7, gives the remedy after the expiration of the tenancy to the landlord himself only; but the statute 3 & 4 Will. IV. c. 42, ss. 37, 38, has extended the power of distress under like circumstances to the executors and administrators in the event of his death (*g*). By the Law of Distress Amendment Act, 1888 (*h*), s. 4, the wearing apparel, bedding, and tenants' tools up to the value of 5*l.* are absolutely protected from distress except where (1) the lease, term, or interest of the tenant has *expired*. (2) Where possession of the premises in respect of which the rent is claimed has been demanded. (3) Where the distress is made not earlier than seven days after such demand. It is difficult to understand why the word "expired" should have been used in this section instead of the words "*ended or determined*" used in the Act of 8 Anne, c. 14. It does not appropriately refer to the determination of a tenancy from year to year by notice to quit. The object of the provision seems to be an inducement to the tenant to give up possession on demand. If he does not do so, the landlord has a more extended power of distress.

(c) Waiver of forfeiture.

It is a recognized rule that if a landlord *after* the breach

(*e*) *Doe* d. *David* v. *Williams*, 7 C. & P. 322.

(*f*) *Burne* v. *Richardson*, 4 Taunt. 720.

(*g*) Bullen, 122; see *ante*, p. 58.

(*h*) 51 & 52 Vict. c. 21.

of a condition in the lease receives rent which has become due since the breach, he thereby recognizes the tenancy as a continuing one, and is not allowed afterwards to take advantage of the condition for re-entry; but a landlord may receive any rent which becomes due *before* the forfeiture, or up to the day of the forfeiture, or he may bring an action to recover it without waiving the forfeiture (*i*).

Waiver by distress.

But there seems to be a difference in the case of waiver by distress; for, according to some writers, a distress for rent due even *before* the forfeiture, with notice of it, amounts to a waiver (*k*); unless the statute 8 Anne, c. 14, applies to the case, for this statute has been thought not to apply to cases of forfeiture (*l*), so that a distress is, even now, an acknowledgment that the tenancy has not up to the time of distraining been determined by forfeiture (*m*). But if the landlord sue in ejectment for the forfeiture, he unequivocally declares his election to determine the lease; and a subsequent distress, whether it is justifiable under that statute, or is a mere trespass, is no waiver (*n*), although the ejectment is directed against the claim of a third person, who comes in and defends in lieu of the occupier, and the occupier is aware of that circumstance, and is never turned out of possession (*o*).

So, also, where the landlord accepts, or distrains for rent, becoming due *after* the forfeiture, it is a waiver (*p*).

(*i*) Sm. L. & T. 3rd ed. 151.

(*k*) Sm. L. & T. 3rd ed. 153; *Dumpor's case*, Sm. L. Cas. 8th ed. 61; *Ward* v. *Day*, 5 B. & S. 359; *Doe* d. *Flower*, v. *Peck*, 1 B. & Ad. 436. But see *Cotesworth* v. *Spokes*, 10 C. B. N. S. 103; Redman & Lyon, L. & T. 2nd ed. 205.

(*l*) *Doe* v. *Williams*, 7 C. & P. 322; *Grimwood* v. *Moss*, L. R. 7 C. P. 360.

(*m*) *Doe* d. *Flower* v. *Peck*, 1 B. & Ad. 436.

(*n*) *Grimwood* v. *Moss*, *supra*; *Tolman* v. *Portberry*, L. R. 7 Q. B. 344; *Bailey* v. *Mason*, 2 Irish Com. Law Rep. 582; Sm. L. & T. 3rd ed. 152.

(*o*) *Bridges* v. *Smyth*, 5 Bing. 410.

(*p*) *Walrond* v. *Hawkins*, L. R 10 C. P. 342; *Cotesworth* v. *Spokes*, 10 C. B. N. S. 103.

Part I. Chap. VI.

(d) Waiver of notice to quit.

If a landlord distrains for rent due after expiration of notice to quit, it is a waiver of that notice (*q*). But where he has in any way acted so as to rebut the presumption of an existing tenancy, as by recovering in ejectment, a subsequent distress by the landlord for rent due after the verdict in ejectment does not waive the notice to quit (*r*). Although if a landlord distrains for rent due after the expiration of a notice to quit, it is a waiver of that notice, yet he may nevertheless distrain: but where a tenant merely holds over after a notice to quit by the landlord, he is not liable to a distress, without some evidence of the renewal of the tenancy (*s*).

Renewal of old tenancy.

If there be anything amounting to a renewal of the old tenancy, the distress will be valid; and as this might arise from an implied as well as an express agreement, a wrongful distress in the first instance acquiesced in by the tenant, might form the ground for a subsequent valid one; or a voluntary payment of rent by the tenant might have the same effect (*t*).

Waiver of disclaimer.

A subsequent distress by the landlord appears to be a waiver of a disclaimer by the tenant of the landlord's title (*u*).

(e) Ejectment.

Common Law Procedure Act, 1852.

As we have seen, a demand of the precise rent due by the landlord upon the premises, at a convenient time before sunset, was formerly necessary before he could take advantage of a condition for re-entry on non-payment of the rent. But now by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210, "if half-a-year's rent is due, *and no sufficient distress is found on the premises*," at

(*q*) *Zouch* d. *Ward* v. *Willingdale*, 1 H. Black. 311.

(*r*) *Doe* d. *Holmes* v. *Darby*, 8 Taunt. 538.

(*s*) *Jenner* v. *Whitehouse*, Moo. & Rob. 213; *Alford* v. *Vickery*, Car. & Marsh. 280; *Blyth* v. *Dennett*, 13 C. B. 178.

(*t*) *Doe* v. *Batten*, Cowp. 243; *Zouch* v. *Willingdale*, 1 H. Black. 311; Bullen, 123.

(*u*) *Doe* d. *David* v. *Williams*, 7 C. & P. 322.

the expiration of the period limited by the proviso for re-entry, the landlord may recover by action of ejectment, without any formal demand or entry. But all proceedings are to cease on payment by the tenant of all arrears and costs, at any time before the trial (*x*). We do not intend to enter into this subject in detail, as it is more applicable to the law of landlord and tenant, than to a work treating solely on distress; but it may not be out of place to state shortly some of the decisions which describe the meaning to be attached to the expression "no sufficient distress on the demised premises, or any part thereof."

Meaning of "no sufficient distress."

And first, we will mention that the "arrears due" must be *all* the arrears, and not merely half-a-year's rent, where more is due (*y*).

The premises must be strictly searched.

A strict search must be made upon the demised premises after the last day for saving the forfeiture, and before the writ is served, to ascertain that there is no sufficient distress on any part of them. So where there was a clause of forfeiture in a lease in case no sufficient distress should be found on the premises; it was held that this must be strictly proved, and in case of a distress being made *every* part of the demised premises must be searched.

In one case a cottage, which was the principal part, was not entered (*z*). And the search must not be restricted to the ground floor, but must extend throughout the premises (*a*). Where there was a proviso in a lease allowing the landlord to re-enter if half-a-year's rent was in arrear for fourteen days, and there was no sufficient distress on the premises, and half-a-year's rent fell into

(*x*) Sect. 212. An under-tenant has the same privilege; *Doe* d. *Wyatt* v. *Byron*, 1 C. B. 623.

(*y*) *Cross* v. *Jordan*, 8 Ex. 149, overruling *Doe* d. *Powell* v. *Roe*, 9 Dowl. 548.

(*z*) *Rees* d. *Powell* v. *King*, 2 Brod. & B. 514.

(*a*) *Price* v. *Worwood*, 4 H. & N. 512; see also *Doe* d. *Forster* v. *Wandlass*, 7 T. R. 117; *Doe* d. *Haverson* v. *Franks*, 2 C. & K. 678.

Part I. Chap. VI.

arrear on the 25th of March, and it was proved that there was no sufficient distress on the premises *some day in May;* it was held, that as the plaintiff gave in evidence that there was no sufficient distress some time in May (which was after the rent had fallen in arrear for more than fourteen days), there was *primâ facie* evidence, at least, to call upon the defendant to show that there was a sufficient distress within the terms of the proviso (*b*). A distress is not to be "found" on the demised premises where it cannot be got at by reason of the tenant having locked the outer doors, &c. (*c*); nor unless the goods are so visibly there that a broker going to distrain would, using reasonable diligence, find them, so as to be able to distrain them (*d*).

III. (a) Where the distress may be made.

By agreement the tenant may give the landlord a power to distrain upon other lands of the tenant than those out of which the rent issues, and such an agreement will bind both the tenant and his assigns. Thus where, by a clause in a lease of coal, it was provided that the landlord might distrain not only upon the mine or land demised, but also upon any other lands in which there should be any pits, through which the coal demised should be in course of working by the lessees, their executors or assigns; it was held, that whether this power was or was not a valid power of distress against *strangers*, the plaintiffs, who took as assignees with notice, were bound by it (*e*).

But, independently of contract, it is a general rule that a distress can only be made of goods found upon some part of the land out of which the rent issues, and not elsewhere (*f*).

(*b*) *Doe* d. *Smelt* v. *Fuchau*, 15 East, 286; see also *Wheeler* v. *Stevenson*, 6 H. & N. 155.

(*c*) *Doe* d. *Chippingdale* v. *Dyson*, 1 Moo. & M. 77; *Doe* d. *Cox* v. *Roe*, 5 D. & L. 272; *Hammond* v. *Mather*, 3 F. & F. 151.

(*d*) *Doe* d. *Haverson* v. *Franks*, 2 C. & K. 678; see Woodf. L. & T. 12th ed. 296.

(*e*) *Daniel* v. *Stepney*, L. R. 9 Ex. 185.

(*f*) Co. Litt. 161 a; Gilb. on Dist. 40; Bullen, 124; Com. Dig. Distress (A. 3), (B. 1); Sm. L. & T. 3rd ed. 223.

Statute of Marlbridge.

This ancient rule of the common law was enforced by the statute of Marlbridge (*g*), which enacts, that "it shall be lawful for no man from henceforth for any manner of cause to take distresses *out of his fee*, nor in the King's highway, nor in the common street, but only to the King or his officers having special authority to do the same."

For this reason if two pieces of land are let by two separate demises, although both be contained in one deed, a joint distress cannot be made for them, as that would be to make the rent of one issue out of the other (*h*).

Where single rent issues out of the land.

And where a single rent issues out of land in the occupation of several tenants, a distress may be made for the whole amount on the land of any one of them (*i*).

And where it was stated in a special verdict that by an indenture the exclusive use of the land of the River Thames opposite to and in front of a wharf between high and low water-mark as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, *but that the land itself between high and low water-mark was not demised;* it was held, that the meaning of this finding either was, that the land was demised as appurtenant to the wharf, and then it would be a finding that one piece of ground was appurtenant to another, which in law could not be, or that the mere use of the land passed, and that was a mere privilege or easement out of which rent could not issue; and consequently, that the lessor could not distrain for rent in arrear barges lying in the space between high and low water-mark and attached to the wharf by ropes (*k*). But where a tenant rented a stable, and was in the habit of keeping his cart on a part of the road adjoining the stable,

(*g*) 52 Hen. 3, c. 15.

(*h*) *Rogers* v. *Birkmire*, 2 Stra. 1040; Rep. temp. Hard. 245.

(*i*) 1 Roll. Abr. 671; Bullen, 125; *Woodcock* v. *Titterton*, 12 W. R. 685, Q. B.

(*k*) *Buszard* v. *Capel*, 8 B. & C. 144.

Part I. Chap. VI.

which had been paved for that purpose by his landlord (the road not being a public thoroughfare, but used principally by foot-passengers); it was held, that the paved part of the road was to be considered part of the demised premises, and the distress was legal (*l*).

The distress may be made upon any part of the land, as the entire rent issues out of the whole and every part (*m*). And, as we have before seen, since the statute 8 Anne, c. 14, it has been held, that where a tenant of a farm holds over part of it after the expiration of a term pursuant to some clause in the lease, or the custom of the country, a distress may be made on that part for all the arrears within six months after the expiration of the tenancy (*n*). And where a definite part of a room is demised for the "standings" of machinery, the payments for such standings may be distrained for (*o*).

So, also, in the case of a rent-charge, if a rent be granted out of one manor with a clause giving a power of distress in another, a distress may be made upon the latter (*p*); or where lands lying in different counties are held under one demise at one entire rent, a distress may be taken in either county for the whole rent in arrear; but where the counties do not adjoin, a distress cannot be chased out of one county into the other (*q*).

Distress on highway.

A distress is expressly forbidden to be taken on the highway, or in the common street, which are not only no part of the land out of which the rent issues, but are

(*l*) *Gillingham* v. *Gwyer*, 16 L. T. N. S. 640.

(*m*) Com. Dig. Distress (A.) 3; Bullen, 125.

(*n*) *Nuttall* v. *Staunton*, 4 B. & C. 51; *Beavan* v. *Delahey*, 1 H. Black. 5; *Lewis* v. *Harris*, *ibid.* 7, n.; *Knight* v. *Bennett*, 3 Bing. 361; Bullen, 125, 120; and see *ante*, pp. 53, 186.

(*o*) *Selby* v. *Greaves*, L. R. 3 C. P. 594; see *Hancock* v. *Austin*, 14 C. B. N. S. 634; *Edmondson* v. *Nuttall*, 17 C. B. N. S. 280; and see *ante*, pp. 5, 35.

(*p*) Bro. Abr. Charge, pl. 17; Bullen, 125.

(*q*) *Walter* v. *Rumball*, 1 Lord Raym. 55.

also privileged for the convenience of passengers, and the encouragement of commerce (*r*).

But where a farm and premises, let for a term at a rent, was described in the lease as adjoining the turnpike-road, and the landlord distrained on the tenant's goods, which were packed on a waggon standing in the middle of the highway next to the demised premises; it was held, that the presumption was that the right to the soil of a moiety of the highway was vested in the tenant, that the waggon was on the demised premises, and that the distress was legal (*s*).

Crown.

An exception to the above rules occurs (as we have seen) in the case of the Crown, which by virtue of its prerogative is entitled to distrain not only on the land out of which the rent issues, but also on all the lands of its tenants, and in some cases even on those in the possession of an under-tenant. It can also distrain upon the highway, and in some cases this privilege is extended to its grantees (*t*).

There are also three other exceptions to the above rules, which are as follows:—

Cattle on common. 11 Geo. 2, c. 19, s. 8.

By the statute 11 Geo. II. c. 19, s. 8, "Landlords are enabled to take as a distress for rent any cattle or stock belonging to their tenants depasturing upon any common, appendant or appurtenant, or in any way belonging to the premises demised."

This enactment does not extend to a distress for a rent-charge (*u*).

Cattle driven off to avoid distress.

If the landlord, or his agent, come to distrain cattle which he sees upon the land, and the tenant, or any other person, drives the cattle off the land to prevent the distress,

(*r*) 52 Hen. 3, c. 15; Co. Litt. 160 b; Gilb. on Dist. 51; Bullen, 125; Woodfall's L. & T. 10th ed. 411.

(*s*) *Hodges* v. *Lawrence*, 18 J. P. 347.

(*t*) 2 Inst. 131; 52 Hen. 3, c. 15; Bullen, 76, 126. As to distresses for gale-rents of quarries in the Forest of Dean, see 59 Geo. 3, c. 86, s. 7.

(*u*) Bullen, 126.

Part I. Chap. VI.

the landlord or his agent may then follow and distrain them even on the highway. In this case the cattle are supposed by a fiction of law to be still on the land. But if he have no view of the cattle whilst on the land, although the tenant drive them off purposely to prevent a distress, or if the cattle themselves after the view go out of the fee, or if the tenant, or any other person, after the view remove them for any other purpose than that of preventing a distress; in these cases the landlord or his agent cannot distrain them (*x*).

(b) Fraudulent removal.

In order to prevent the clandestine removal of goods off demised premises by tenants to avoid a distress for rent, the statute 8 Anne, c. 14, s. 2, authorized landlords to follow and distrain them within five days after such removal (*y*).

8 Anne, c. 14, s. 2.

This was afterwards extended in point of time by the statute 11 Geo. II. c. 19, which provides as follows:—

11 Geo. 2, c. 19.

By sect. 1, "In case any tenant or tenants, lessee or lessees, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements or hereditaments, upon the demise or holding whereof any rent is, or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable, it shall and may be lawful, to and for every landlord or lessor, landlords or lessors, &c., or any person or persons by him, her, or them, for that purpose lawfully empowered, *within the space of thirty days next ensuing* such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels,

(*x*) Co. Litt. 161 a; 2 Inst. 132; *Clement* v. *Milner*, 3 Esp. 95; Bullen, 125, 126; Sm. L. & T. 3rd ed. 234, 235; Woodfall's L. & T. 10th ed. 411.

(*y*) This section has been repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59).

wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises, for such arrears of rent; any law, custom, or usage to the contrary in anywise notwithstanding."

By sect. 2, it is provided that "no landlord or lessor, or other person entitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold *bonâ fide*, and for a valuable consideration before such seizure made, to any person or persons not privy to such fraud as aforesaid."

And by sect. 7, it is provided that "where any goods or chattels fraudulently or clandestinely conveyed, or carried away by any tenant or tenants, lessee or lessees, his, her, or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, close, or place locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other person or persons empowered to take, and seize, as a distress for rent, such goods and chattels (first calling to his, her, or their assistance the constable, headborough borsholder, or other peace officer of the hundred, borough, parish, district, or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein; and in case of a dwelling-house, oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein) in the daytime to break open and enter such house, barn, stable, outhouse, yard, close, and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she, or they might have done by virtue of this or any

Part I. Chap. VI.

former Act, if such goods and chattels had been put in any open field or place."

The cases within these sections.

We will now consider what cases are within these sections.

Where a tenant held under an agreement, with a stipulation that it was only to operate until a lease should be made, but until such lease was made the rent, &c., should be paid, and the several rights and remedies enforced, as if it had been executed; it was held that this agreement created a tenancy at will at a fixed rent, for which the landlord had a right to distrain and to seize the tenant's goods (which had been fraudulently removed) under the first section of this statute (*z*).

Where the removal has been after the landlord has conveyed away his reversion, he cannot seize under this statute (*a*).

As to the removal.

The removal must have taken place after the rent became due (*b*). "It is the place, not the time of a distress, to which the statute means to apply the remedy" (*c*).

But where by a demise rent was reserved due quarterly, and on one of the quarter days, and whilst the quarter's rent was unpaid, the tenant fraudulently removed his goods from the premises; it was held that the statute

(*z*) *Anderson* v. *Midland Railway Company*, 3 El. & El. 614.

(*a*) *Ashmore* v. *Hardy*, 7 C. & P. 501; *Pluck* v. *Digges*, 2 Dow & Clark, 180; see also *Angell* v. *Harrison*, 17 L. J. Q. B. 25.

(*b*) *Watson* v. *Main*, 3 Esp. 15.

(*c*) *Rand* v. *Vaughan*, 1 Bing. N. C. 767, per Tindal, C. J.; *John* v. *Jenkins*, 1 Cromp. & M. 227; *Northfield* v. *Nightingale*, 1 L. J. K. B. 219. But see *Furneaux* v. *Fotherby*, 4 Camp. 135, where Lord Ellenborough doubted whether a landlord can follow and distrain upon goods fraudulently removed from the premises the night before the rent became due for the purpose of avoiding a distress. It is submitted he cannot. Bullen, 127; and see *Watts* v. *Thomas*, 1 Jurist, 719.

enabled the landlord to distrain the goods within thirty days after their removal: Campbell, C. J., observing, "that the statute only requires that the tenant shall fraudulently remove his goods to prevent his landlord distraining the same for arrears of rent 'reserved, due, or made payable' upon a demise. It does not say that the rent shall be in arrear at the time of the removal" (*d*).

The fact of a removal being clandestine is of importance chiefly as evidencing fraud; and the statute may now be said to apply to all cases where a landlord, by the conduct of his tenant in fraudulently removing goods from the premises, is turned over to his barren right of bringing an action for its recovery (*e*). Thus, where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods; it was held, that although the removal might not be *clandestine*, yet if it was fraudulent, the landlord was justified under the statute (*f*). And the question of what is fraudulent is for the jury to decide, although the tenant admits at the trial that the goods were removed to prevent a distress (*g*). The mere removal of goods is not of itself fraudulent as against the landlord; to justify him in following them it must be shown that the goods were removed with a view to elude the distress, and also that sufficient was not left upon the premises (*h*); but it is not necessary to show in proof of concealment of

Mere removal of goods is not of itself fraudulent.

(*d*) *Dibble* v. *Bowater*, 2 E. & B. 564, distinguishing *Rand* v. *Vaughan*, *supra*. Rent payable quarterly is *due* on the morning of the day on which it is reserved or made payable, although it is not *in arrear* until the following day.

(*e*) Bullen, 128.

(*f*) *Opperman* v. *Smith*, 4 D. & R. 33; *Bach* v. *Meats*, 5 M. & S. 200.

(*g*) *John* v. *Jenkins*, 1 Cromp. & M. 227; *Incop* v. *Moorchurch*, 2 F. & F. 501.

(*h*) *Parry* v. *Duncan*, 7 Bing. 243. But see *Gilham* v. *Arkwright*, 16 L. T. 88; Woodfall's L. & T. 10th ed. 422.

Part I. Chap. VI.

cattle, that they were withdrawn from sight; if they have been removed to a neighbour's field, so as to cause difficulty to the landlord in finding them, it is sufficient (*i*).

It is not necessary, in order to exercise the right given by this Act, that the party upon whose lands the goods are seized should himself be privy to the fraud (*k*); the statute applies to the goods of the tenant only, and not to those of a stranger or lodger (*l*). Therefore a plea justifying the following goods off the premises, and distraining them for rent in arrear, must show that they were the tenant's goods (*m*).

A clandestine removal must always be pleaded specially (*n*).

In case of bankruptcy of the lessee.

But the trustees of a bankrupt lessee are considered as tenants; and therefore, where the trustees of a bankrupt, who was lessee of certain pasture land, allowed the tenant's cows to remain on the demised premises, and ordered them to be milked there; it was held that the trustees thereby became tenants to the landlord, and the cows being removed to avoid a distress, the landlord had a right to follow and distrain them under this statute (*o*).

When a *bonâ fide* creditor of a tenant, knowing the tenant to be in distressed circumstances, and fearing that he would be distrained upon by his landlord, went to the premises for which the rent was in arrear, and with the knowledge and consent of the tenant drove away a number of cattle, not exceeding in value the amount of his

(*i*) *Stanley* v. *Wharton*, 9 Price, 301.

(*k*) *Williams* v. *Roberts*, 7 Exch. 618.

(*l*) *Thornton* v. *Adams*, 5 M. & S. 38.

(*m*) *Postman* v. *Harrell*, 6 C. & P. 225; *Fletcher* v. *Marillier*, 9 Ad. & Ell. 457; *Foulger* v. *Taylor*, 5 H. & N. 202; *Furneaux* v. *Fotherby*, 4 Camp. 135; *Vaughan* v. *Davis*, 1 Esp. 257; see *Jones* v. *Williams*, 11 A. & E. 643.

(*n*) *Ibid.*; see also *Spencer* v. *Harrison*, 2 C. & K. 429; *West* v. *Nibbs*, 4 C. B. 172; *Blackey* v. *Dinsdale*, Cowp. 661.

(*o*) *Welch* v. *Myers*, 4 Camp. 368.

demand; it was held, that this was not a fraudulent removal within the statute (*p*).

Under the 7th section it has been held that the terms of the enactment must be strictly complied with, and the presence of a constable is required, and must be stated in a plea of justification where doors or gates are broken open (*q*).

Assistance given to party removing.

But it is not necessary that the party seizing the goods fraudulently removed should first call to his assistance an ordinary police officer; it is sufficient if he be assisted by a person appointed as special constable for the occasion (*r*), or that there should be a previous request to open the doors in order to give the right to break in (*s*). By 2 & 3 Vict. c. 47, s. 67, it is enacted, that "in the Metropolitan Police District any constable may stop and detain, until due inquiry can be made, all carts and carriages which he shall find employed in removing the furniture of any house or lodging between the hours of eight in the evening and six of the following morning, or whenever the constable shall have good grounds for believing that such removal is made for the purpose of evading the payment of rent."

2 & 3 Vict. c. 47, s. 67. Distress in the Metropolitan Police District.

Where the plaintiff occupied a house as tenant to the defendant, the term of which expired on the 29th of September, and removed his goods from the premises on the 27th, 28th, and 29th of September, and on the 18th of October the defendant seized the goods off the premises as a distress for rent; it was held, that the defendant was not entitled to seize the goods (under sect. 1 of this statute), unless he could have seized the same under the statute 8 Anne, c. 14, s. 7, if they had remained on the premises; and as by the 8 Anne, c. 14, goods can only be seized during the possession of the tenant, the seizure was wrongful (*t*).

(*p*) *Bach* v. *Meats*, 5 M. & S. 200; Bullen, 128, note 9.

(*q*) *Rich* v. *Wooley*, 7 Bing. 651: *Foss* v. *Racine*, 4 M. & W. 419.

(*r*) *Cartwright* v. *Smith*, 1 Moo. & Rob. 284.

(*s*) *Williams* v. *Roberts*, 7 Exch. 618.

(*t*) *Gray* v. *Stait*, L. R. 11 Q. B. D. 668.

Treble damages.

Where goods fraudulently removed and distrained on the premises of a third party are rescued by him, it may be a question whether an action for treble damages under the statute 2 Will. & Mary, sess. 1, c. 5, s. 4, for rescuing a distress will lie against him (*u*). Carrying away furniture to avoid a distress for rent is an illegal act, and if the offender commits homicide in doing so, he may be guilty of murder (*v*). A landlord, apprehending that there would be an attempt to remove a steam engine upon which he had distrained, cautioned his bailiff, and suggested that he should have two men to watch—one by night and one by day. The bailiff stipulated that he should not be liable if the distress was clandestinely removed, but he employed a man only to watch by day. The goods were removed in the man's absence, and the landlord recovered damages from the bailiff. Coleridge, C. J., holding that the bailiff was bound to use reasonable care, and to have a watch night and day, unless the goods were clandestinely removed so as to bring it within the exception of the agreement; but he did not think that this was so, there being no evidence to show that the removal was even by night (*w*).

(c) Remedies in case of fraudulent removal.

11 Geo. 2, c. 19, s. 3.

Forfeiture of double value.

With regard to the means of prevention provided by the legislature in order to deter tenants from fraudulently conveying away their goods and chattels, and others from wilfully aiding and assisting them or concealing the goods, it is enacted by the 11 Geo. II. c. 19, s. 3, that "if a tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid; or *if any person or persons shall wilfully and knowingly aid or assist* any such tenant or lessee in any such fraudulent conveying away, or carrying off of any part of his or her goods or chattels, or in concealing the same; all and every person, and persons so offending, shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estate such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her, or them respectively carried off or concealed as aforesaid; to be recovered by action of debt" (*x*).

And by sect. 4 it is provided, that "in case such goods

(*u*) *Harris* v. *Thirkell*, 20 L. T. 98; *post*, p. 316.

(*v*) *Rex* v. *Hodgson*, 1 Leach, C. C. 6; 1 East, P. C. 258.

(*w*) *White* v. *Heywood*, 5 T. L. R. 115.

(*x*) See County Court Rules, 1889, O. IV. r. 1.

do not exceed the value of 50*l.*, it shall and may be lawful for the landlord or landlords from whose estate such goods or chattels are removed, his, her, or their bailiff, servant, or agent, in his, her, or their behalf, to exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace of the same county, riding or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, or if any such witness be one of the people called Quakers, upon affirmation required by law; and in a summary way determine whether such person or persons be guilty of the offence with which he or they are charged; and to inquire in like manner of the value of the goods and chattels by him, her, or them respectively so fraudulently carried off or concealed as aforesaid; and *upon full proof of the offence, by order under their hands and seals*, the said justices of the peace may and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords, his, her, or their bailiff, servant, or agent, at such time as the said justices shall appoint; and in case the offender or offenders having notice of such order shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender or offenders; and for want of such distress may commit the offender or offenders to the House of Correction, there to be kept to hard labour without bail or mainprize for the space of six months, unless the moneys so ordered to be paid as aforesaid shall be sooner satisfied."

Double value, where goods worth less than 50*l.* may be recovered before justices.

And by sect. 5, "It shall and may be lawful for any person, who thinks himself aggrieved by such order of the said two justices, to appeal to the justices of the peace at their next general or quarter sessions to be held for the same county, riding or division of such county, who may and shall hear and determine such appeal, and give such costs to either party as they shall think reasonable, whose determination therein shall be final."

Appeal.

The third section of this statute is considered to be so

Decisions on

Part I. Chap. VI.

the above sections.

far penal, that in an action against a third party for assisting the tenant in such fraudulent removal, it is necessary to bring the case by strict proof within the words of the first section; and, therefore, it is incumbent on the landlord not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant (*y*). But the creditor of a tenant may, with the assent of his debtor, take possession of the goods of the latter, and remove them from the premises for the purpose of satisfying a *bonâ fide* debt, without incurring the penalty inflicted by the third section of the statute, although the creditor takes possession knowing the tenant to be in distressed circumstances, and under an apprehension that the landlord will distrain (*z*).

In an action on this section against a tenant for fraudulently removing his goods from off the premises to avoid a distress, it is not necessary to show an actual participation in the removal, if it be proved to be with his privity (*a*); and it seems that it is immaterial whether the removal took place by night, or with any particular concealment. In such an action the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the defendant, if by other evidence he is proved to have contributed to the facility of it; and circumstances of suspicion may be laid before the jury to prove such a fraudulent co-operation as the legislature contemplated. In order to support such an action it is not necessary to prove that a distress was in progress, or about to be put in execution, or even contemplated; it is enough if the rent be shown to be in arrear, and that the goods have been removed afterwards (*b*). A colourable possession

(*y*) *Brooke* v. *Noakes*, 8 B. & C. 537.

(*z*) *Bach* v. *Meats*, 5 M. & S. 200.

(*a*) *Lister* v. *Brown*, 1 C. & P. 121.

(*b*) *Stanley* v. *Wharton*, 9 Price, 301; 10 Price, 138; *Woodgate* v. *Knatchbull*, 2 T. R. 154; Bullen, 215.

by a servant of the tenant, will not deprive the landlord of his remedy on the statute (*c*).

The fourth section of the statute giving the summary remedy before two magistrates, provided the value of the goods is not above 50*l.*, does not take away the jurisdiction of the Superior Courts in cases where the goods are of less than that value (*d*). And the fact that the landlord in the first instance made his complaint before a magistrate will not preclude him from afterwards maintaining an action; for the remedy given by that section is cumulative, and therefore the landlord may elect at his option which course may be most convenient to himself (*e*).

Remedy is cumulative.

The justices under this section may inquire into and adjudicate on an information for the alleged fraudulent removal of goods by a tenant, although it appear that the property in the premises is disputed, and that the tenant has paid the rent to one of the claimants (*f*). Justices, either of the county from which the tenant fraudulently removed the goods, or of that in which they are concealed, may convict the offenders in their counties (*g*).

The goods need not be enumerated or specified in the order of the justices; it is sufficient if they find the value (*h*).

What the order must show.

The adjudication of the justices is an order, and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form (*i*). It must show on the face of it that the party removing the goods

(*c*) *Ex parte Pilton*, 1 B. & A. 369.

(*d*) *Horsefall* v. *Davy*, Holt, 147; *Baster* v. *Carew*, 3 B. & C. 649; *Stanley* v. *Wharton*, 9 Price, 301; 10 Price, 138; *Bromley* v. *Holder*, 1 M. & M. 175; Bullen, 216.

(*e*) *Stanley* v. *Wharton*, *supra*; *Horsefall* v. *Davy*, *supra*.

(*f*) *Coster* v. *Wilson*, 3 M. & W. 411.

(*g*) *Rex* v. *Morgan*, Cald. 157; Woodfall's L. & T. 12th ed. 438.

(*h*) *Rex* v. *Rabbits*, 6 D. & Ry. 243.

(*i*) *Rex* v. *JJ. of Cheshire*, 5 B. & Ad. 439.

was tenant; and that is not sufficiently shown by stating that, on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent another person from distraining them for arrears of rent due to him for the said premises, and that, it appearing that he did so remove, &c., he is convicted thereof. The order must also state that the complainant is the landlord, or the agent, bailiff, or servant of the landlord, and that the party removing is tenant (*k*).

Where a warrant of commitment for a fraudulent removal did not state that there had been a complaint in writing to the justices, or that the examination of witnesses was upon oath; but it referred to the order of the justices (for payment of double the value of the goods removed) in which those matters were stated; it was held to be sufficient, and that the justices were not liable on trespass (*l*).

In the order by the magistrates it is necessary that the offence of aiding and abetting a fraudulent removal of goods should be charged to have been committed "wilfully and knowingly" (*m*).

If an order of justices, by which a party is adjudged to pay double the value of the goods removed for the purpose of preventing the landlord distraining, does not state that the offender was summoned, that the complaint was adjudged to be true on evidence given upon oath, and that there was proof before the justices that the party "wilfully and knowingly" assisted in the removal of the goods, it is bad, although it specifies the full proof of the offence on which the justices convicted and adjudicated (*n*).

The appeal given by sect. 5 of this Act is subject to the conditions and regulations prescribed and given by the

(*k*) *Rex* v. *Davis*, 5 B. & Ad. 551; *Ex parte Fuller*, 2 D. & L. 98; Woodfall's L. & T. 12th ed. 438.

(*l*) *Coster* v. *Wilson*, 3 M. & W. 411.

(*m*) *Reg.* v. *JJ. of Radnorshire*, 9 Dowl. 90.

(*n*) *Ex parte Morgan*, 4 Jurist, 916.

Summary Jurisdiction Act, 1879 (*o*); and therefore notice of appeal must be given within *seven days* after the decision appealed against (*p*).

Notice of appeal.

IV. (a) Distress how made.

The landlord may either distrain in person, or by an authorized bailiff or agent (*q*). The statute of Westminster II. (*r*), which enacts, that no distress shall be taken except by bailiffs "sworn and known," does not apply to distresses taken for rent in arrear (*s*).

Bailiffs.

An infant cannot be appointed a bailiff (*t*).

Where the assignees of a bankrupt, in consequence of an arrangement entered into between the bankrupt and his creditors, gave to the bankrupt an authority in writing to receive the rents and arrears of rent due on certain premises, the property of the bankrupt previous to his discharge, and that his receipts should be a complete discharge to them; it was held that such authority did not confer a power to distrain (*u*).

It is hardly necessary to say that care should be taken in selecting a proper person as bailiff; and recent legislation has admitted this by the provisions with regard to the appointment and certificates of bailiffs contained in the Law of Distress Amendment Act, 1888 (*x*). These provisions, however, do not seem to alter the previous law with respect to the landlord's liability for his bailiff's

(*o*) 42 & 43 Vict. c. 49, s. 31, sub-s. 2, and s. 32.

(*p*) *Reg.* v. *JJ. of Shropshire*, L. R. 6 Q. B. D. 669.

(*q*) Bullen, 129; Sm. L. & T. 3rd ed. 246; Woodfall's L. & T. 10th ed. 411.

(*r*) 13 Edw. 1, stat. 1, c. 37.

(*s*) The bailiffs mentioned in this statute are bailiffs employed by the lords of Courts for compelling parties to follow the county, hundred, wapentake, and other like Courts, and not bailiffs distraining for rent. Per Tindal, C. J., in *Begbie* v. *Hayne*, 2 Bing. N. C. 124; 2 Scott, 193; *Child* v. *Chamberlain*, 6 C. & P. 213; see also 2 Inst. 445; Cro. Eliz. 14.

(*t*) *Cuckson* v. *Winter*, 2 Man. & R. 313.

(*u*) *Ward* v. *Shew*, 9 Bing. 608.

(*x*) 51 & 52 Vict. c. 21, s. 7. See *post*, pp. 210 *et seq.*

irregular acts. They merely add a further protection against misconduct by bailiffs—viz., by rendering them liable to have their certificate cancelled, and subjecting them, as well as the person who has authorized them to levy, to an action of trespass.

Landlord is liable for his bailiff's irregular acts.

The landlord is personally responsible for all *irregular* acts committed by his bailiff in the making of a distress, such as selling without due notice, or without a proper appraisement, when required, or not selling for the best price, or distraining goods for an excessive amount, or making extortionate charges, &c. (*y*), and this, although the irregular act is done without the landlord's knowledge or sanction; but he is not liable for any *illegal* acts committed by his bailiff, unless it can be proved that he has authorized such acts, or ratified and adopted them with knowledge of what had been done on his behalf; or that he chose without inquiry to take the risk upon himself and adopt such acts (*z*). Thus, where a broker, under a warrant from a landlord authorizing him to distrain the goods and chattels of the tenant, seized a fixture, which was afterwards sold and the proceeds paid to the landlord; it was held that a receipt of the proceeds did not make the landlord liable, it not being shown that he was aware of the illegal seizure (*a*).

But not for illegal acts.

But the presence of a landlord with a broker on the premises of the tenant immediately after they have been forced open by the broker, and the fixtures torn down, is sufficient evidence of the landlord's liability for the wrongful act of breaking open outer doors and taking fixtures as a distress for rent (*b*).

(*y*) *Haseler* v. *Lemoyne*, 5 C. B. N. S. 530; *Ward* v. *Shew*, *supra*; *Dawe* v. *Cloud*, 14 L. T. 155.

(*z*) *Haseler* v. *Lemoyne*, *supra*; *Lewis* v. *Read*, 13 M. & W. 834; Woodfall's L. & T. 12th ed. 425.

(*a*) *Freeman* v. *Rosher*, 13 Q. B. 780; *Green* v. *Wroe*, W. N. 1877, p. 130; but see *Gauntlett* v. *King*, 3 C. B. N. S. 59.

(*b*) *Moore* v. *Drinkwater*, 1 F. & F. 134.

Distinction between illegal and irregular acts.

The distinction seems to be between matters which are *altogether outside the broker's authority*, such as seizing fixtures, &c., and the case *of an irregularity committed by the bailiff* whilst acting *within* his authority. Where a landlord does not personally interfere in a distress, he is not liable for the neglect of his broker in failing to deliver a copy of the charges of the distress required by 57 Geo. III. c. 93, s. 6 (*c*).

But although the landlord may be personally liable *primâ facie* for the act of his bailiff in illegally conducting a distress, yet if, when he knows of the circumstances, he disclaims and repudiates such illegal acts, he is not responsible for them (*d*).

A slight recognition by the landlord of what has been illegally done on his behalf may amount to an adoption and ratification of such illegal acts, and so render him personally liable for them.

Evidence of authority to distrain.

Thus, where A. who received the rent and generally managed the property of B., in B.'s name, and without his authority, signed a warrant of distress, and after the goods had been distrained, B. said that he should leave the matter in his hands; it was held that this was sufficient evidence that the distress was authorized, or ratified and adopted by B. (*e*).

Theft by bailiff.

A person employed as a distraining broker, if engaged in the service of the landlord only, and paid a salary by him, is a servant within the meaning of 24 & 25 Vict. c. 96, s. 67, and may be found guilty of embezzlement (*f*).

Where a bailiff was instructed to levy a distress, and his assistant stole certain moneys from the person whose goods had to be seized, and the bailiff afterwards entered into an agreement not to prosecute him if the moneys stolen were

(*c*) *Hart* v. *Leach*, 5 L. J. Ex. 244. But see pp. 261, 262.

(*d*) *Hurry* v. *Rickman*, 1 Moo. & Rob. 126.

(*e*) *Haseler* v. *Lemoyne*, 5 C. B. N. S. 530.

(*f*) *Rex* v. *Flanagan*, 10 Cox Cr. Cas. 561.

Part I. Chap. VI.

repaid to him; and such moneys were accordingly paid to the bailiff, but before he could hand them to the person from whom they were stolen he was taken into custody upon the charge of compounding a felony, it was held that the offence was complete as soon as the bailiff had entered into the illegal agreement to abstain from prosecuting, and that he was guilty of compounding a theft although he was not the owner of the moneys stolen (*g*).

Mortgagor in possession.

A mortgagor in possession is *presumptione juris* authorized to distrain as the bailiff of the mortgagee (*h*). So, also, where a mortgage has been paid off by the assignee of the equity of redemption, who takes from the mortgagee an undertaking to execute a re-assignment of the mortgage, the assignee has an implied authority, as bailiff, to distrain in the name of the mortgagee (*i*). But a mortgagee in possession is not chargeable as for wilful default in declining to defend an action of replevin brought by the owner of property which was on the premises and seized under a distress for rent levied by the mortgagee (*j*).

By the recent Act (*k*) it seems necessary that before a mortgagor in possession can distrain as bailiff he must obtain a certificate.

Distress to be levied by certified bailiffs.

Provision has been made as to the appointment of bailiffs who are empowered to distrain by the Law of Distress Amendment Act, 1888 (*l*), which by sect. 7 enacts that—From and after the commencement of this Act no person

(*g*) *Reg.* v. *Burgess*, 2 Times Law Rep. 176.

(*h*) *Trent* v. *Hunt*, 9 Exch. 14; upholding *Wootley* v. *Gregory*, 2 You. & J. 536; *Reece* v. *Strousberg*, 54 L. T. N. S. 133; *Dean of Christ Church, Oxford* v. *Duke of Buckingham*, 33 L. J. C. P. 322.

(*i*) *Snell* v. *Finch*, 13 C. B. N. S. 651.

(*j*) *Cocks* v. *Gray*, 26 L. J. Ch. 607.

(*k*) Section 7 of the Law of Distress Amendment Act, 1888.

(*l*) 51 & 52 Vict. c. 21, which repeals a similar provision under the 52nd section of the Agricultural Holdings (England) Act, 1883.

shall act as bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff by a certificate in writing (*m*) under the hand of a County Court judge; and such certificate may be general or apply to a particular distress or distresses, and may be granted at any time after the passing of this Act in such manner as may be prescribed by rules under this Act. If any person holding a certificate shall be proved to the satisfaction of the judge of a County Court to have been guilty of any extortion or other misconduct in the execution of his duty as a bailiff he shall be liable to have his certificate summarily cancelled by the said judge.

Misconduct of bailiff.

Nothing in this section shall be deemed to exempt such bailiff from any other penalty or proceeding to which he may be liable in respect of such extortion or misconduct.

A County Court registrar may exercise the power of granting certificates hereby conferred upon a County Court judge in cases in which he may be authorized to do so by rules made under this Act.

If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this Act (*n*), the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass.

There seems to be nothing in this Act to oblige the bailiffs thus appointed to act within the limits only of the County Court by which they are appointed. But we will mention here a case which was decided under the similar provision of the Agricultural Holdings (England) Act, where a bailiff having levied a distress outside the district of the County Court judge by whom he was appointed, it was held that such distress was good, and that any County Court judge had authority to appoint bailiffs for the

(*m*) For form of general and special certificate, see App. A. (17) and (18).

(*n*) This probably means "if any person contrary to the provisions of this Act, not holding a certificate, shall levy a distress," &c.

Part I. Chap. VI.

purpose of levying distresses in any part of England and Wales (*o*).

Rules under Law of Distress Amendment Act, 1888.

The following rules have been passed pursuant to sect. 8 of the Law of Distress Amendment Act, 1888:—

1. These rules may be cited as the Distress for Rent Rules, 1888.

2. Certificates (*p*) granted under the Law of Distress Amendment Act, 1888, hereinafter called the Act, may be either general or special. A special certificate shall specify the particular distress or distresses to which it applies. Certificates shall be in the forms Nos. 1 and 2 in Appendix I. to these Rules, with such variations as circumstances may require.

Special certificate.

3. A special certificate may be granted by the judge or registrar, but a general certificate shall only be granted by the judge in person.

General certificate.

4. A general certificate shall authorize the bailiff named in it to levy at any place in England or Wales.

5. Any person (not being an officer of a County Court (*q*)) holding a certificate under the Agricultural Holdings Act, 1883, shall on application be entitled to obtain, without fee, a general certificate.

6. No certificate shall be granted to any officer of a County Court (*q*).

7. Any practising solicitor of the Supreme Court shall, on application, and on payment of the prescribed fee, be entitled to a general or special certificate.

8. A general or special certificate may, on payment of the prescribed fee, be granted to any applicant who satisfies the authority granting the same that he is a fit and proper person to hold the certificate.

Security.

9. Where the applicant for a certificate is not a ratepayer, rated on a rateable value of not less than 25*l.* per annum, he may, if the authority applied to thinks fit, be required to give security for the due performance of his duties.

(*o*) *Re Sandars, Ex parte Sarjeant*, 52 L. T. N. S. 516.

(*p*) For form of certificate, see App. A. (17) and (18). These rules come into force from August 31, 1888.

(*q*) The words "officer of a County Court" do not apply to any officer who was an officer of a County Court before the date of these rules. See Rule of Dec. 7th, 1888.

10. The security shall be security to the satisfaction of the registrar. In the case of a general certificate the amount shall be 20*l.*, and in the case of a special certificate the amount shall be 5*l.*

11. The security shall be given to the registrar. It may be given by deposit, or by bond, or by guarantee, as the registrar may think fit.

Forfeiture of security.

12. On any application to cancel a certificate the judge may, whether he cancels the certificate or not, order that the security shall be forfeited either wholly or in part, and that the amount directed to be forfeited shall be paid to the party aggrieved.

13. Where the judge orders that the security shall be forfeited either wholly or in part, but does not cancel the certificate, he may direct that the bailiff shall give fresh security as a condition of retaining his certificate.

14. Subject to rule 12, where a certificate is cancelled by the judge, the security shall also be cancelled, and the deposit (if any) returned.

19. "Judge" means a judge of County Courts.

"Certificate" means a certificate to act as a bailiff under sect. 7 of the Act.

"Registrar" means registrar of a County Court, and each registrar where there is more than one, and includes a deputy registrar.

The tables of fees, charges, and expenses with regard to brokers will be found in subsequent pages (*q*).

Fees for certificates and securities.

The following are the fees appointed with regard to certificates and securities (*r*) :—

	s.	*d.*
For every application for a general certificate .	5	0
For every application for a special certificate .	2	6
For approving of security by bond . . .	10	6
For receiving deposit in lieu of bond . . .	4	0

(*q*) *Post*, pp. 257, 259, 260.

(*r*) Schedule to Treasury Order, 15 Sept. 1888, Law of Distress Amendment Act, 1888.

Part I. Chap. VI.

(b) Warrant of distress.

Not strictly necessary.

When a distress is made by a bailiff he should properly have an authority in writing from his employer, which is commonly called a "warrant of distress," or a "distress warrant" (*s*). But a warrant of distress, though always proper and advisable, is not strictly necessary (even in the case of a corporation aggregate, which may appoint a bailiff to distrain (*t*), or to take goods damage feasant as bailiff (*u*), without deed or warrant); for a man may distrain without any previous express authority, and if he afterwards obtain the assent of the person in whose right he distrains, such assent will have relation back to the time of taking the distress, and will be as effectual as a command would have been, according to the maxim, "*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" (*x*).

Thus, where in replevin against a broker it was proved that the landlord employed his solicitor to defend the broker, that was held to be sufficient evidence of the broker's authority to distrain, in the absence of any written warrant (*y*). And a bailiff who has received authority from a testator to distrain, but has not in fact distrained until after the death of the testator, may make cognizance as bailiff of the executor, if the latter has ratified the distress after probate, although the distress was made before probate (*z*).

(*s*) Bullen, 130.

(*t*) *Carey* v. *Matthews*, 1 Salk. 191; see judgment of Lord Denman, C. J., in *Smith* v. *Birmingham Gas Company*, 1 Ad. & Ell. 529.

(*u*) *Manby* v. *Long*, 3 Lev. 107; Bac. Abr. Corporations, E. 3.

(*x*) Gilb. Dist. 32; Bro. Abr. tit. Traverse, 3; *Lamb* v. *Mills*, 4 Mod. 378; *Trevillian* v. *Pine*, 11 Mod. 112; *Potter* v. *North*, 1 Saund. 347, n. (4); *Jones* v. *Bright*, 5 Bing. 533; *Maclean* v. *Dunn*, 4 Bing. 722.

(*y*) *Duncan* v. *Meiclcham*, 3 C. & P. 172; see also *Crabb* v. *Killick*, 6 Car. & P. 216.

(*z*) *Whitehead* v. *Taylor*, 10 Ad. & El. 210; and see *Toplis* v. *Grane*, 5 Bing. N. C. 636. As to adoption of the act of a bailiff by a corporation, see *Smith* v. *Birmingham and Staffordshire Gas Light Company*, 1 Ad. & Ell. 526.

Where a landlord gives a warrant to distrain, he impliedly authorizes the bailiff to receive the amount of rent and costs, if tendered by the tenant; and such authority cannot be limited by an express instruction given on behalf of the landlord to the bailiff not to receive the rent, but to refer the tenant to the landlord's solicitor (*a*).

Effect of warrant.

The warrant of distress does not require a stamp (*b*).

Stamp not required.

As we have stated previously, before partition coparceners may either join in signing a distress warrant, or one may sign on behalf of the other (*c*); but after partition they may each make several distresses (*d*). And one of several co-heirs in gavelkind may sign a distress warrant for rent due to himself and his co-heirs, without authority from them (*e*).

One joint tenant may sign a distress warrant and appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if, when applied to, they merely decline to act, that will not prevent him from proceeding (*f*).

Tenants in common may distrain each for his respective share of the rent, but one alone cannot distrain for more than his own share (*g*). They may, however, join in a warrant to distrain for rent due to all of them (*h*).

Where a warrant of distress was produced by the plaintiff, purporting to be issued by the solicitors of the landlords of certain property, the writing being in the hand of a junior partner of the firm, and the solicitors had on previous occasions issued distress warrants in respect of

(*a*) *Hatch* v. *Hale*, 15 Q. B. 10; for form of distress warrant see Appendix A. (1) and (2).

(*b*) *Pyle* v. *Partridge*, 15 M. & W. 20. See Stamp Act, 1870.

(*c*) *Ante*, p. 45.

(*d*) *Ante*, p. 45.

(*e*) *Ante*, p. 47; *Leigh* v. *Shepherd*, 2 Brod. & B. 465.

(*f*) *Ante*, p. 48; *Robinson* v. *Hoffman*, 4 Bing. 562.

(*g*) *Ante*, p. 50.

(*h*) Woodfall's L. & T. 10th ed. 384, 412.

other property of the landlord; it was held, that this was not sufficient evidence of an authority by the landlords to distrain (*i*).

(c) Indemnity to broker.

We have seen that the landlord is liable for the irregular acts of his broker; but not for his illegal acts, unless he subsequently ratifies or adopts them. And as, in general, a warrant of distress creates an express or implied indemnity to the bailiff and his assistants against actions which are maintainable on the ground that the landlord had no legal right to distrain, such bailiffs will be free from liability, if they act according to the powers conferred on them by the warrant; but this indemnity does not extend to the bailiff's illegal acts; neither does it extend to his irregular acts. On the contrary, the landlord has a remedy over against the bailiff for any loss or damage he may have sustained by reason of such negligence or misconduct. Where A. gave authority to B. to distrain on the goods of C., and gave him an indemnity against all costs and charges that he might be at "on that account," and upon B. making the distress, his men being told by C.'s son that a certain cask contained spent liquor of no value, took the cask to pieces and let the liquor run off, and it was, in fact, cochineal dye belonging to D., who recovered damages against B. for the wasting of it; it was held that B. could not recover the amount of those damages from A. in an action on the indemnity, and that such an indemnity would only apply to cases where a distress was illegal, because the landlord had no right to put in such distress (*k*). Where the defendant authorized the plaintiffs, or their agent, to distrain certain goods, which turned out to be privileged from distress, and required them to levy forthwith whilst the goods were upon the premises, undertaking to indem-

Does not extend to illegal or irregular acts.

(*i*) *Jones* v. *Buckley*, 2 Jurist, 204.

(*k*) *Draper* v. *Thompson*, 4 C. & P. 84. See also *Groom* v. *Bluck*, 2 M. & G. 567.

nify them for so doing; and the plaintiffs' clerk erased their names from the distress warrant, and inserted those of others with that of an agent, who distrained accidentally, and who recovered from the plaintiffs the loss incurred by making the illegal distress; it was held, that the defendant was liable under his undertaking to the plaintiffs for the expenses which they had incurred in consequence of acting under his authority, and also, that the erasion by their clerk of the plaintiffs' names, and the insertion of those of others, did not invalidate the authority, or negative the fact of the plaintiffs being employed by the defendant; also, that the knowledge possessed by the defendant of the circumstances under which the goods on which the levy was made had been placed upon the premises, was sufficient to remove all grounds of suspicion as to the legality of the distress from the minds of the plaintiffs, and exempted them from the necessity of making an inquiry on the subject: Tindal, C. J., remarking, "Where an act has been done by the plaintiff, under the express directions of the defendant, which occasions an injury to the rights of third persons, yet if such act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof" (*l*).

Where brokers take goods privileged from distress.

But in ordinary cases a broker who takes goods privileged from distress cannot look for an indemnity from his employer. Where a landlord signed a warrant of distress in the following form:—"I hereby authorise R. I., or his agent, as my agent, to seize and distrain the goods on the premises in the possession of M. G. for 9*l.*, being the amount of rent due to me, and for your so doing this shall be your sufficient warrant, authority, and indemnification against all costs and charges in respect to any law expenses, action, or actions that may arise, as well as any other and

(*l*) *Toplis* v. *Grane*, 5 Bing. N. C. 636. See also *Betts* v. *Gibbins*, 2 Ad. & Ell. 57.

all other charges and expenses which you or your agent may be at, or brought against you or your agent on this account"; and a servant of R. I. having distrained, an action was brought against him by the tenant for the conversion of certain goods, some of which were alleged not to have been in the inventory, in which action the plaintiff was non-suited; it was held that, assuming that the servant had done nothing wrong, the indemnity extended to the costs of defending the action brought against him (*m*).

Undertaking to indemnify does not require a stamp.

An undertaking whereby a party, describing a distress to be taken for rent claimed to be due to him, engages to indemnify the bailiff who makes the distress, does not require an agreement stamp (*n*).

(d) Entry. Outer door cannot be broken open.

In order to make a distress the *outer* door of a house can in no case be broken open; except, as we have seen, in the case of a fraudulent removal of goods (*o*). For this is one of the cases in which the maxim holds "that every man's house is his castle" (*p*). But if the person distraining can by any means get into the house without committing a trespass, he may do so, and then lawfully distrain.

Thus, trespass was held not to lie against a landlord who occupied an apartment over a mill which was demised to his tenant (from which it was divided only by a boarded floor without any ceiling), for taking up the floor of his own apartment and entering through the aperture to distrain for rent (*q*). If the outer door be open, however, the inner doors may afterwards be broken in order to find any goods which are distrainable (*r*). But a landlord has

(*m*) *Ibbett* v. *De la Salle*, 6 H. & N. 233.

(*n*) *Cox* v. *Bailey*, 6 M. & G. 193.

(*o*) See *ante*, p. 197.

(*p*) *Semayne's case*, 5 Co. Rep. 91; 1 Sm. L. C. 8th ed. 114; Sm. L. & T. 3rd ed. 247.

(*q*) *Gould* v. *Bradstock*, 4 Taunt. 562.

(*r*) *Browning* v. *Dann*, Bull. N. P. 81; Co. Litt. 161 a.

not power to break open the outer door of a stable, though not within the curtilage (*s*). Nor can he break open gates, or break down enclosures (*t*), nor forcibly open a padlock on a barn door (*u*). But a landlord may open the outer door in the ordinary way which persons using the building are accustomed to open it. Therefore, where the door of a stable was kept closed by a padlock attached to a moveable staple, and the owner and other persons usually opened the door by pulling out the staple; it was held that a distress made upon goods in the stable, after an entry in this manner, was legal (*x*). But where a man came to the stable of his tenant to make a distress, and finding that the door was shut with a bar put in his hand through a hole, took away the bar, and opened the door; it was held that this was illegal, the reason being, that that was not the ordinary method of obtaining admission to the premises (*y*). So, also, an entry into a house by opening a window which is fastened with an ordinary hasp (*z*), or through a window which is shut, but not fastened, is illegal (*a*).

Instances of legal and illegal entry.

Therefore, where a broker went with a warrant of distress for rent to the demised premises, the front door of which he found fastened, and in the course of the day a man in the employ of the landlord was allowed by the tenant to enter by the front door in order to get access to the area for the purpose of removing and repairing a grating over it, which was in a dangerous state, and whilst the repairs were going on the tenant left the house, having first fastened the front and area doors, and on the workman finding himself unable to get out after refixing the grating,

(*s*) *Brown* v. *Glenn*, 16 Q. B. 254.
(*t*) Co. Litt. 161 a.
(*u*) 9 Vin. Abr. 128; Distress, E. 2, pl. 6.
(*x*) *Ryan* v. *Shilcock*, 7 Exch. 72.
(*y*) Fitzherbert, Abr. tit. Distress, pl. 21.
(*z*) *Hancock* v. *Austin*, 14 C. B. N. S. 634.
(*a*) *Nash* v. *Lucas*, L. R. 2 Q. B. 590.

the broker suggested to him to try the window which opened into the area and was closed at the time, which window being unfastened the man pulled the sash down, entered the house, and unfastened the front door from the inside, on which the broker entered and distrained; it was held that this must be taken as one transaction, and that as the entry was by opening the window, the distress was unlawful, the judges doubting whether, if the door had been unfastened and opened by an independent third person, the entry by the broker would have been lawful. In this case, Cockburn, C. J., says: "The old authorities do not go so far as the modern. The later authorities say you may open a door which is only fastened by a latch. That, I think, was going a very long way. In Chief Baron Gilbert's time it would appear that a landlord could not open an outer door for the purpose of distraining, if it were shut (*b*). . . . The Court of Exchequer have held that he may open a door which was closed but not fastened (*c*); and if a man leaves his door unfastened there may be an implied licence to any one who has business to enter the premises. But that must stand on its own grounds; the principle will not apply to a closed, but unfastened, window. Again, it has been said that you may go in at an open window to make a distress (*d*). But it is nowhere said that you may open a window for the purpose. . . . Therefore, the authorities are limited in application either to the case where the door is shut, but can be opened without violence, or where the window is open, and can be entered without doing any violence. But if the window be shut, you are doing violence if you open it, when neither directly

(*b*) Gilb. Dist. by Impey, p. 56. This is also borne out in Rolle, Abr. tit. Distress, where it is said, "A distress for rent may be taken in a house, if the door be open, otherwise not." 46 Edw. 3, 26, b 7. "A man may distrain for the rent of a house *per ostia et fenestras*."

(*c*) *Ryan* v. *Shilcock*, 7 Exch. 72.

(*d*) *Nixon* v. *Freeman*, 5 H. & N. 652.

nor impliedly is the entry made by the licence of the owner of the house" (*e*).

Forcible entry.

Where the bailiffs enter by forcibly breaking through a window, the distress is void *ab initio;* and the measure of damages is the actual value of the goods taken. The jury in estimating such damages ought not to make any deduction from such value in respect of the rent due (*f*).

As we have seen, a distress may be made by an entry through an open window (*g*). And in the very recent case of *Crabtree* v. *Robinson* (*h*), where a bailiff, employed to make a distress, found a window partly open, but not sufficiently to admit of his entering the house, and by direction of the defendants (the landlord and a broker employed by him), *he raised the window*, and so obtained access to the house and opened the front door; it was held that such an entry was lawful; Manisty, J., observing, "The cases seem to result in this, that to make an entry the latch of a door may be lifted though the door be closed; but that in the case of a window, entry can only be made if the window is to some extent open, and for the purpose of entry in such cases the window may be further opened."

Entry through a window.

A broker is justified in climbing over a fence surrounding a house, and entering by a back door for the purpose of distraining (*i*). But it is a great question whether this is law now; for it was decided in a more recent case (*k*), that where a landlord in making a distress got over a fence or wall of from five to six feet in height at the back of the tenant's house, such being the only means of effecting an entrance, as the front door was locked, such a mode of entry was illegal.

(e) Re-entry to distrain.

After an entry is once legally effected, and the distress

(*e*) *Nash* v. *Lucas*, *supra*.

(*f*) *Attack* v. *Bramwell*, 3 B. & S. 520.

(*g*) *Tutton* v. *Darke*, 5 H. & N. 647.

(*h*) L. R. 15 Q. B. D. 312.

(*i*) *Eldridge* v. *Stacey*, 15 C. B. N. S. 458.

(*k*) *Scott* v. *Buckley*, 16 L. T. N. S. 573.

made, if it be not abandoned, but the distrainor has been compelled to quit the house by the tenant's violence, he may return with competent force, and after a demand of admittance break open even the outer door; for this would only be a recontinuance of the first taking, and consequently would be lawful (*l*).

But where a person has merely got his arm between the door and the lintel, or by putting a pair of shears between the door and the lintel has prevented its being closed, this is not a "possession" such as will entitle him to break open a door or window for the purpose of gaining admission to the house; and therefore a distress made under such circumstances is illegal *ab initio* (*m*).

Where a man put in possession under a distress quitted possession for a short time for an unavoidable purpose, this was held not to be an abandonment; and therefore, when he came back and found the door of the house closed, he was justified in breaking it open and re-entering (*n*).

Abandonment.

But where a broker's man, after taking possession of property under a distress, and remaining in possession two days, left the house in a state of excitement bordering on insanity; and the landlord, thinking that the man's leaving had been procured by the drugging of his liquor by the parties in the house (but which was not proved), six days afterwards broke into the house and took away the goods without any previous demand of admission; it was held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them (*o*). But in another case (*p*), where a broker having been forcibly expelled regained possession by force after an

(*l*) Per Wilmot, J. See Espinasse, N. P. 382; Bullen, 133; *Eagleton* v. *Gutteridge*, 11 M. & W. 465; *Pugh* v. *Griffith*, 7 A. & E. 827.

(*m*) *Boyd* v. *Profaze*, 16 L. T. N. S. 431.

(*n*) *Bannister* v. *Hyde*, 2 E. & E. 627.

(*o*) *Russell* v. *Rider*, 6 C. & P. 416; Woodfall, L. & T. 12th ed. 429.

(*p*) *Eldridge* v. *Stacey*, 15 C. B. N. S. 458.

interval of three weeks; it was held that he was justified in so doing, and that it was a question for the jury whether by staying out so long he had abandoned the distress.

Temporary abandonment.

But where the distrainor permits a stranger to take away the goods for a temporary purpose, this is not an abandonment.

So where a landlord distrained upon his tenant (a livery-stable keeper), and took a pony and carriage belonging to one of the tenant's customers, and whilst the broker was in possession, the owner, who was ignorant of the distress, was allowed to take his pony and carriage out as usual, the broker believing that he would bring them back; it was held that this was not an abandonment of the distress, and that the owner having brought them back they were still subject to a distress (*q*).

Where a bailiff or broker, after having been ejected from a distress, re-enters to distrain, he should confine himself to the same goods (*r*).

When a police officer should be called in.

In making a distress for rent, circumstances may occur which require the presence of a police officer; but to justify the landlord in calling him in, it must be shown that his presence was rendered necessary, either from threats of resistance, or the apprehension of violence (*s*).

Where the assistants of a sheriff's officer, for the purpose of executing a writ of *fi. fa.*, illegally entered the plaintiff's premises on a Sunday by breaking open a window, and on the next day by the officer's direction abandoned possession, and on the Thursday following the officer himself entered the same premises to execute a distress warrant; it was held that he was not debarred by the acts of his assistants from selling the goods when

(*q*) *Kerby* v. *Harding*, 6 Exch. 234.

(*r*) *Smith* v. *Farr*, 3 F. & F. 505.

(*s*) *Skidmore* v. *Booth*, 6 C. & P. 777; Bullen, 133.

Part I. Chap. VI.

seized on the second occasion, though it was doubted whether the officer would have been liable if the illegal entry of his assistants on the Sunday had facilitated his own entry on the Thursday, and he had availed himself of such illegal entry (*t*).

(f) Seizure. Mode of.

After entry, in order to complete the distress, a seizure is necessary; and the most proper manner of doing this is for the person distraining, whether the landlord or the bailiff, to go upon the premises and take hold of some personal chattel, declaring that it is taken as a distress in the name of all the goods, or of so much as will satisfy the rent in arrear; and this is held to be a good seizure of all (*u*). But any act or words expressive of an intention to distrain will suffice. Thus, where a landlord's broker went to the tenant's house, and pressed for payment of rent alleged to be due, and for the expenses of the levy, but *touched nothing*, and made no inventory; and the tenant paid him the rent and expenses under protest, upon which he withdrew; it was held that he could not under these circumstances deny the fact of a distress (*x*).

Acts sufficient to constitute a seizure.

Again, where a landlord's agent went upon the tenant's premises, walked round them, and gave a written notice that he had distrained certain goods lying there for arrears of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold, and then went away, not leaving any person in possession; it was held that this was a sufficient seizure to give the tenant a right of action for an excessive distress; and that quitting the premises without leaving anyone in possession was not an abandonment of the distress; Bayley, J., remarking: "The landlord has no right to keep the goods on the premises. If, therefore, he quitted

(*t*) *Percival* v. *Stamp*, 22 L. J. Ex. 25.

(*u*) *Dodd* v. *Morgan*, 6 Mod. 215; *Draper* v. *Thompson*, 4 C. & P. 84; Bullen, 131; Woodfall, L. & T. 10th. ed. 416.

(*x*) *Hutchins* v. *Scott*, 2 M. & W. 809.

possession of the goods whilst they remained on the premises, that *was* an abandonment of the distress; but the mere leaving of the goods in a place where he has a right to keep them, without anything to indicate an intention to abandon, *cannot* operate as an abandonment. It would be very hard upon the tenant if this were otherwise; for then in all cases of distress by the landlord upon premises where a man cannot remain in possession, he must immediately remove the goods" (*y*).

What constitutes an abandonment.

And where a weekly tenant in the house of the defendant was in arrear with his rent, and he had in his lodgings a hired piano, which the owner sent for, but which the landlord's wife refused permission to be taken away until his rent was paid, such landlord not having actually seized the property; it was held, that this constituted a sufficient seizure; Cockburn, C. J., observing: "I think that this case is governed by that of *Wood* v. *Nunn* (*z*). In that case there certainly was an actual seizure by laying hands upon the articles." (The landlord to whom rent was in arrear, on hearing his tenant and a stranger disputing about the removal of a lathe, entered the house, and laying his hands on the machine, said: "I will not suffer this, or any of the things, to go off the premises till my rent is paid.") "But a seizure may be constructive as well as actual. It is enough that the landlord or his agent takes effectual means to prevent the removal of the article from off the premises, on the ground that rent is in arrear. This he did when he declared that the article should not be removed until the rent was paid" (*a*).

Constructive seizure.

Where A. entered B.'s house, and said that he had come to make a distress, and began taking an inventory, but finding that he had made a mistake, left the house without

(*y*) *Swann* v. *Earl of Falmouth*, 4 Q. B. 123; *Hartley* v. *Moxham*, 3 Q. B. 701.

(*z*) 5 Bing. 10.

(*a*) *Cramer* v. *Mott*, L. R. 5 Q. B. 357; see also *England* v. *Cowley*, L. R. 8 Ex. 126.

removing any of the goods; it was held that his acts did not amount to making a distress (*b*).

Where a distress is made by a bailiff he should show the cause of making it, if required to do so; but if not so required he may distrain generally (*c*).

Things privileged should not be taken.

Great care should be observed not to distrain things which are privileged from distress, either absolutely or *sub modo* (*d*); and that an excessive amount be not taken for such distress (*e*). The quantity of goods taken must be as fairly proportionate to the amount of rent in arrear as possible. Where a tenant had paid all his rent, and had his landlord's receipt for it, but fearing that his goods would be taken on legal process, agreed with his landlord to destroy the receipt, and that the latter might put in a distress for rent to protect the goods, and the landlord did so and sold the goods, keeping the proceeds; it was held, that the distress was good as between the landlord and tenant, though void as against a third person, and the tenant had no action against his landlord for it (*f*).

Hire purchase system.

A tenant had obtained some furniture on the hire purchase system, and during his absence the owner removed the furniture. The landlord brought an action for such removal; but it was held that no action would lie, as the goods had not actually been distrained (*g*).

(g) Inventory of the goods distrained.

After a seizure has been made it is necessary for the landlord, or his bailiff, to make an inventory (*h*); as it is of course right that the tenant should be informed what goods the landlord intends to comprise within the distress,

(*b*) *Spice* v. *Webb*, 2 Jur. 943; see also *Tennant* v. *Field*, 8 El. & Bl. 336.

(*c*) *Buller's case*, 1 Leon. 50.

(*d*) See *ante*, Chap. V.

(*e*) As to excessive distress, see *post*, pp. 334—341; Bullen, 133.

(*f*) *Sims* v. *Tuffs*, 6 C. & P. 207.

(*g*) *Pool* v. *Lewin, Crawcour and Co.*, 1 Times Law Rep. 165.

(*h*) For form of Inventory, see App. A. (3) and (4); and for Notice of Distress (5) and (6).

so that he may know what he will be obliged to replevy (*i*). And for this purpose the landlord has to make a list, or inventory, of as many goods as are judged sufficient to cover the rent distrained for, together with the costs of the distress. A copy of this, together with a *notice*, required by the statute 2 Will. & Mary, sess. 1, c. 5, s. 2 (which is as a rule written at the foot of the inventory), of the fact of the distress having been made, with the cause of such taking, must be served on the tenant himself, or left at his house, "or other most notorious place on the premises charged with the rent distrained for." The notice must also comprise a statement of the time when the goods will be appraised and sold, unless previously replevied, or the rent and charges satisfied (*k*). There should in all cases be a witness present to prove the regularity of the proceedings. A parol notice of distress is insufficient under this statute; it must be in writing; the object of the legislature seeming to be that otherwise the matter would be left to parol evidence (*l*); though it has been held that where the notice can be personally given, it is not *absolutely* necessary that it should be in writing (*m*).

Notice.

Parol notice.

Where a notice of distress under this statute stated that the party giving the notice had "distrained the goods, chattels, and things mentioned in the inventory hereunder written;" and in the inventory referred to one clock and weights were named, and then followed the words "and any other goods and effects that may be found in and about the said premises;" it was held that this notice, though very loose, could not be considered insufficient, as it appeared that all the goods upon the premises were intended to be, and were, distrained upon (*n*).

But, on the other hand, where a notice of distress stated

(*i*) As to replevin, see *post*, Chap. XII.

(*k*) 2 Will. & Mary, sess. 1, c. 5, s. 2.

(*l*) *Wilson* v. *Nightingale*, 8 Q. B. 1034.

(*m*) *Walter* v. *Rumbal*, 1 Lord Raym. 53.

(*n*) *Wakeman* v. *Lindsey*, 14 Q. B. 625.

Part I. Chap. VI.

that "by virtue of an authority to me given I have seized the goods, chattels, and effects specified in the schedule hereunder annexed for the sum of 170*l.* due, &c.," and the schedule specified certain goods, and concluded as follows:—"and all other goods, chattels, and effects that may be found in and about the said premises that may be required to satisfy the above rent, together with the expenses;" it was held that the notice was too vague and uncertain to justify the sale of the goods of a stranger which he had deposited on the premises (*o*).

What the notice should state.

The notice need not state when the rent distrained for became due (*p*), nor the correct amount of the arrears really due. Where a landlord distrained for a larger amount of rent than was due, and gave a notice of distress, mentioning this incorrect amount, although the goods distrained were of less value than the rent really due, and before the sale took place a second notice was given claiming only the amount really due; it was held, by the case of *Tancred* v. *Leyland* (*q*) (overruling that of *Taylor* v. *Henniker* (*r*)), and affirmed by the case of *Stevenson* v. *Newnham* (*s*), that a count for distraining for more rent than is due was bad, although it alleged that the distress was made maliciously; for an act which does not amount to a legal injury is not actionable, even if done with a bad intent.

Want of notice.

A want of notice under this statute does not render the distress invalid, but it makes it irregular to sell (*t*). And omitting to state that the goods are impounded does not make the impounding void (*u*). So where, on distraining for rent in a dwelling-house, which was chiefly occupied

(*o*) *Kerby* v. *Harding*, 6 Ex. 234.
(*p*) *Moss* v. *Gallimore*, 1 Doug. 279.
(*q*) 16 Q. B. 669.
(*r*) 12 A. & E. 488.
(*s*) 13 C. B. 285.
(*t*) *Trent* v. *Hunt*, 9 Ex. 14; *Lucas* v. *Tarleton*, 3 H. & N. 116; *Wilson* v. *Nightingale*, 8 Q. B. 1034; *Robinson* v. *Waddington*, 13 Q. B. 753.
(*u*) *Tennant* v. *Field*, 8 E. & B. 336.

by lodgers, the distrainor took down in the kitchen, at the dictation of the tenant's wife, an inventory of the furniture in the other rooms, and a man was left in possession, and a copy of the inventory, with a notice that the articles enumerated therein had been distrained for rent, also left, and the tenant thanked his landlord for the way in which the distress had been made; it was held that, the tenant having assented to what had been done, this constituted a distraining of the articles mentioned in the inventory, and the tenant could not afterwards object that this was not an impounding as against a subsequent tender by him of the rent (*x*).

Cause of the taking.

As we have before mentioned, the statute expressly directs that the notice shall specify the *cause* of the taking, and this must therefore be done correctly. For though the old rule that a man may distrain for one cause and justify for another (*y*) may still obtain where it is applicable, and in all cases so far as the *taking* is concerned, yet in order to justify a distrainor in proceeding to a *sale* under this statute, the giving a notice of the taking, and of the cause of it, appears to be a condition precedent (*z*).

(h) Impounding.

The distress having been made, it next becomes necessary to consider what the distrainor has to do with it, and how it has to be kept and treated.

At common law.

At common law the distress was always considered in the light of a *pledge*, but it was a pledge with which the landlord could not deal as he thought proper. For it was his duty to *impound it in a common pound*. By thus doing he placed it in the custody of the law.

He was obliged to see that the pound was in a fit state, and suitable to the nature of the distress. And it was

(*x*) *Tennant* v. *Field*, *supra*.

(*y*) *Crowther* v. *Ramsbotham*, 7 T. R. 654; *Etherton* v. *Popplewell*, 1 East, 142. But see *Buller's case*, 1 Leon. 50; *Phillips* v. *Whitsed*, 2 E. & E. 804; *Trent* v. *Hunt*, *supra*; *Wootley* v. *Gregory*, 2 Y. & J. 536.

(*z*) Bullen, 137.

Part I. Chap. VI.

formerly supposed to remain there for an indefinite period until redeemed by payment of the rent and expenses, or until replevied; but now, by the statute 2 Will. & Mary, c. 5, it has only to be kept for the space of five days, at the expiration of which it may be *sold*, unless previously replevied, or satisfaction made. This altered the rule at common law where, as a distress was considered in the light of a pledge, a sale of it was held to be an abuse of the distress; and the distrainor who did so became a trespasser *ab initio*, and all his proceedings void (*a*). This latter principle was laid down in the *Six Carpenters' Case* (*b*); though, as we shall see hereafter, it is no longer applicable to distresses for rent in arrear (*c*).

2 Will. & Mary, c. 5.

The pound.

A pound is either *overt* (or open overhead) or *covert* (or closed). Cattle should always be impounded in a pound overt; the reason of this being that the owner was bound to keep and sustain them at his peril; but furniture and goods, which are liable to be damaged by wet weather, or to be stolen, must be placed in a house, or other covert pound. A learned writer has described a pound covert to be "one covered at least overhead, and sometimes a complete enclosure, as a house, barn, or stable, where the owner of the distress cannot enter" (*d*).

Definition of a pound covert.

In the event of the removal of the distress the rules of the common law respecting the impounding must still be observed; and the distinctions between the pound overt and covert, and the common, or public, and private pound are very important. Thus, if cattle be impounded in a common, public, or open pound, the owner of them is bound to take notice of it; but if they are put into a

Distinctions between the different kinds of pounds.

(*a*) Gilb. Dist. 67; Smith, L. & T. 3rd ed. 254; *Dodd* v. *Morgan*, 6 Mod. 216.

(*b*) Co. Litt. 146; 1 Smith, L. C. 8th ed. 143.

(*c*) See *post*, p. 242.

(*d*) Co. Litt. 47 b; Kitch. 144; Terms de Ley, Doctor & Student, l. 2, c. 27; 5 Hen. 7, ix. b; Com. Dig. tit. Distress, D.; 3 Bl. Com. 12; Bullen, 142.

private pound, then notice of the place must be given to him by the distrainor (*e*).

Public and private pounds.

Pounds may also be divided into *private* and *public* ones; if taken to a private one the distrainor was obliged to supply the beasts impounded with sustenance, and to keep them at his peril (for which he had no satisfaction), and if they died for want of sustenance he was answerable for them (*f*). But if he put them into a public pound, they lay there at the tenant's risk. If they starved it was his loss, and the landlord was not answerable (*g*). This was, however, altered by the statute 5 & 6 Will. IV. c. 59, s. 5, which has now been repealed by the statute 12 & 13 Vict. c. 92, s. 5, which has, in its turn, been amended by the statute 17 & 18 Vict. c. 60, s. 1.

17 & 18 Vict. c. 60, s. 1.

12 & 13 Vict. c. 92, s. 5.

The provisions of these Acts are as follows:—By the statute 12 & 13 Vict. c. 92, s. 5, it is enacted, that "every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature, any animal, shall provide and supply during such confinement a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid, shall, for every such offence, forfeit and pay a penalty of twenty shillings."

As to the "keeper" of the pound.

In the case of *Dargan* v. *Davies* (*h*) it was held that the *keeper* of a common pound is not, as such, within the words of this section, a "person who impounds or confines, or causes to be impounded or confined," animals brought to his pound. He is, therefore, not under an obligation to provide such animals with food and water, nor subject to the penalty for neglecting to do so; Mellor, J., remarking, "It would have been so very easy to have used words

(*e*) Co. Litt. 47 b; 3 Bl. Com. 13.

(*f*) 1 Inst. 4; Co. Litt. 47 b; Bullen, 143.

(*g*) Bac. Abr. tit. Distress (D); Doctor & Student, 14; Dial. 1, ch. 5.

(*h*) L. R. 2 Q. B. D. 118.

which would beyond all doubt have included the keeper of the pound, if such had been the intention; but I think that the legislature thought that the penalty of twenty shillings would be sufficient to induce the person impounding animals to supply them with necessary food and water."

By sect. 6, "In case any animal shall at any time be impounded or confined as aforesaid, and shall continue confined without fit and sufficient food and water for more than twelve successive hours, it shall and may be lawful *to and for any person whomsoever*, from time to time and as often as shall be necessary, *to enter into* and upon any pound or other receptacle of the like nature in which any such animal shall be so confined, and to supply such animal with fit and sufficient food and water during so long a time as such animal shall remain and continue confined as aforesaid, without being liable to any action of trespass or other proceeding by any person whomsoever for or by reason of such entry for the purposes aforesaid; and the reasonable cost of such food and water shall be paid by the owner of such animal, before such animal is removed, to the person who shall supply the same, and the said cost may be recovered in like manner as herein provided for the recovery of penalties under this Act."

Entry into the pound to supply animals with food.

17 & 18 Vict. c. 60.

And by the statute 17 & 18 Vict. c. 60 (after reciting that it is doubtful whether the 12 & 13 Vict. c. 92, gives any remedy *to the person impounding* for the recovery of compensation for the food and water provided, and that by that statute no power is given to *sell* the animal, although provisions for that purpose were contained in the statute 5 & 6 Will. IV.), it is provided by sect. 1, that "every person who, since the passing of the said Act of the twelfth and thirteenth years of her Majesty, has impounded or confined, or hereafter shall impound or confine, as in the said Act mentioned, any animal, and has provided and supplied, or shall hereafter provide and supply, such animal

with food and water as therein mentioned, shall and may, and he is hereby authorized to recover of and from the owner or owners of such animal not exceeding *double the value* of the food and water so already or hereafter to be supplied to such animal, in like manner as is by the said last-mentioned Act provided for the recovery of penalties under the same Act; and every person who has supplied, or shall hereafter supply, such food and water shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, *to sell* any such animal openly at any public market (after having given three days' public printed notice thereof) for the most money that can be got for the same, and to apply the produce in discharge of the value of such food and water so supplied as aforesaid, and the expenses of and attending such sale, rendering the overplus (if any) to the owner of such animal."

Recovery of compensation for food and water provided.

Power of sale.

Under this statute it has been decided (*i*) that where several animals are distrained for rent one of them may be sold for the expenses of all: and this may be repeated *toties quoties*. But where to a declaration in trespass for seizing seven horses and selling two of them the defendant pleaded that he distrained the seven horses damage feasant and impounded them, that he supplied the seven horses so impounded with food, and that he sold the two horses under the authority of the statute (5 & 6 Will. IV. c. 59, s. 4), and applied the produce of the sale in discharge of the value of the food so supplied, and of the expenses incurred by the sale; it was held, that as the statute authorized the party to sell *only so many* as might be necessary to indemnify himself, the plea was bad, for not showing that it was necessary to sell more than one horse (*k*).

Decisions under this statute.

(*i*) *Layton* v. *Hurry*, 8 Q. B. 811; *Mason* v. *Newland*, 9 C. & P. 575.

(*k*) *Layton* v. *Hurry*, *supra*.

Part I. Chap. VI.

The person selling must exercise a reasonable discretion, and act *bonâ fide* (*l*).

Person selling must exercise a reasonable discretion.

The statutes do not apply to all cattle taken under all circumstances, but only to cattle or animals impounded or confined in cases where the distrainor had a right to distrain, or at least some colour for it (*m*).

A party who distrains cattle and impounds them is bound to see that the pound is in a fit state to receive the cattle distrained at the time of such impounding. Generally, the manor pound would be the proper place, but if that is not in a fit state he must find another; for "the party distraining is to impound for *safe custody*, but not so as to destroy the subject of distress" (*n*). This is not confined to cattle, but may extend to inanimate things doing damage (such as a locomotive engine) (*o*); and it is not necessary to leave to the jury explicitly the question whether the defendant knew of the unfit state of the pound, for he is bound to know it, and, moreover, he must be taken to have known it (*p*).

Extends to inanimate things.

Theft from a pound overt.

If cattle are stolen from a pound overt the distrainor is not liable for the loss, because such a pound is the proper one for the impounding of cattle (*q*); but if cattle are tied in the pound and strangle themselves, or if the distrainor puts a horse into a pound with spikes in it, by which the horse wounds itself, he will be liable; for any act of his which tends to the injury of the thing distrained is done

(*l*) Per Denman, C. J., in *Layton* v. *Hurry*, *supra*.

(*m*) *Machell* v. *Ellis*, 1 C. & K. 682 (decided on 5 & 6 Will. 4, c. 59, ss. 4, 19).

(*n*) *Wilder* v. *Speer*, 8 Ad. & Ell. 547; Gilbert on Distress, 62; 2 Inst. 106; Co. Litt. 376; Bac. Abr. Distress (D).

(*o*) *Ambergate Railway Company* v. *Midland Railway Company*, 2 El. & B. 793; Bl. Com. vol. iii. 249.

(*p*) *Bignell* v. *Clarke*, 5 H. & N. 485.

(*q*) *Vasper* v. *Edwards*, 1 Lord Raym. 719; Holt, 256; Bac. Abr. Distress (D).

at his peril; but not if they die by the act of God; and in this latter case he may distrain again (*r*).

Escape from pound.

When cattle distrained damage feasant are impounded, and escape from the pound without the fault of the distrainor, his remedy by action for the trespass remains (*s*).

Working or using the distress.

Moreover, at common law the distrainor could not, and cannot now, *work or use* the distress, whether it be in an open or a covert pound; for he has no property in it; he only holds it as a pledge, and it is an abuse of his power if he does so use it (*t*). So where a distrainor works horses or kills sheep that are impounded, the owner may interfere and prevent this abuse; and no action can be maintained against him for pound breach or rescue (*u*). An exception to this rule exists in the case of milch kine, which may be milked by the distrainor; because "this is necessary for their preservation, and consequently a benefit to the owner" (*x*).

Exception to the rule.

A pound-keeper is bound to receive everything offered to his custody, and is not answerable whether the thing were legally impounded or not (*y*); and an action does not lie against him for merely receiving a distress, though the original taking is tortious, unless he exceeds his duty and assents to the tortious act: for the pound being the custody of the law, if the distress be wrongfully taken the distrainor is answerable, and not the keeper of it.

(*r*) Gilbert, Distress, 65; Bac. Abr. Distress (D); Smith, L. & T. 2nd ed. 234; *Gates* v. *Bayley*, 2 Wils. 313.

(*s*) *Williams* v. *Price*, 3 B. & Ad. 695; *Vasper* v. *Edwards*, *supra*.

(*t*) But he may make what profit of it he can whilst it remains in the pound.

(*u*) *Smith* v. *Wright*, 6 H. & N. 821.

(*x*) Bac. Abr. tit. Distress (D) (2); *Bagshaw* v. *Goward*, Cro. Jac. 148. But see *Chamberlayne's Case*, 1 Leon. 220; Roll. Abr. 673, 1, 32, 9; Vin. Abr. pl. 18; Bullen, 149; *Duncomb* v. *Reeve*, Cro. Eliz. 783.

(*y*) *Badkin* v. *Powell*, Cowp. 478; *Branding* v. *Kent*, 1 T. R. 62.

When cattle are at once impounded, he cannot let them out of such custody without a replevin or the consent of the party (*z*).

Neither can a pound-keeper bring an action if the pound be broken; it must be brought by the party interested (*a*).

Where the distress may be impounded.

Formerly at common law a landlord might have impounded his distress in what county he pleased; and he had a right to drive the cattle to any distance. This was a great hardship to the tenant, who was thereby at a loss where to find his beasts, if he wished either to feed or replevy them (*b*). The first improvement in the law in this respect was by statute 52 Hen. III. (Statute of Marlbridge), c. 4, which prohibited the person distraining from driving the distress *out of the county*.

Statute of Marlbridge.

1 & 2 Ph. & Mary, c. 12, s. 1.

But even this being found to be too great a latitude, the statute 1 & 2 Ph. & Mary, c. 12, was passed, which by sect. 1 enacts, that "no distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where such distress is or shall be taken, except that it be to a pound overt within the same shire, not above three miles distant from the place where the said distress is taken; and that no cattle or other goods distrained or taken by way of distress for any manner of cause at one time, shall be impounded in several places, whereby the owner or owners of such distress shall be constrained to sue several replevies for the delivery of the said distress so taken at one time; upon pain every person offending contrary to this Act shall forfeit to the party grieved for every such offence an hundred shillings and treble damages" (*c*).

Decisions on the statute.

As will be seen from this statute, a distress cannot be

(*z*) *Badkin* v. *Powell*, *supra*.

(*a*) *Badkin* v. *Powell*, *supra*; Fitz. N. B. 228; 2 Chitty, pl. 549, 7th ed.; Woodfall, L. & T. 10th ed. 427.

(*b*) Gilbert, Distress, 4th ed. by Impey, 62; Bullen, 144.

(*c*) For expenses of impounding, see *post*, p. 262.

driven out of one county into another, even though it be to the nearest pound, and within three miles of the place of the distress. So where lands lying in two adjoining counties were let under one demise at an entire rent, and the landlord distrained cattle in both counties for rent in arrear, he might chase them all into one county; but if the counties had not adjoined it would have been otherwise (*d*). Where a distress was made in the hundred of Offley, in Staffordshire, and was afterwards impounded within the city of Lichfield (which was formerly within the hundred, but was afterwards, by letters-patent, made a county of itself), it seems to have been considered as irregular within this statute (*e*).

The offence created by this statute for impounding a distress in a wrong place is but a single offence, and is satisfied by one forfeiture, though three or four persons are concerned in doing the act; for the offence cannot be severed so as to make each offender separately liable to the penalty; the meaning of the statute being that the penalty shall be referred to the offence and not to the person (*f*). Thus, where three persons distrained a flock of sheep, and severally impounded them in three several pounds, it was held that they should forfeit but one five pounds and one treble damages (*g*).

Where the action may be brought.

In an action for driving a distress out of a hundred into another county, the action may be brought in either county (*h*).

But this statute, though not repealed, has for the most part ceased to be of any practical importance; for it

(*d*) *Woodcraft* v. *Thompson*, 3 Lev. 48; *Walter* v. *Rumball*, 1 Lord. Raym. 53; *Gimbart* v. *Pelah*, 2 Stra. 1272; Bullen, 145; Woodfall, L. & T. 10th ed. 428.

(*e*) Gouldsb. 100; Bullen, 145.

(*f*) *Rex* v. *Clarke*, Cowp. 612.

(*g*) *Partridge* v. *Naylor*, Cro. Eliz. 480; Moore, 453.

(*h*) *Pope* v. *Davis*, 2 Taunt. 252. It is not within 31 Eliz. c. 5, or 21 Jac. 1, c. 4, s. 2. *Fife* v. *Bousfield*, 8 Q. B. 100.

Part I. Chap. VI.

appeared so much better, both for the landlord and tenant, that the distress should not be taken off the premises at all, but should remain there in a situation equally and easily accessible to both (*i*), that by the statute 11 Geo. II. c. 19, s. 10, it was enacted as follows: that "it shall be lawful to and for any person or persons lawfully taking any distress for any kind of rent, to impound or otherwise secure the distress so made, of what nature or kind soever it may be, *in such place or on such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding* and securing of such distress; and to appraise, sell, and dispose of the same upon the premises, in like manner, and under the like directions and restraints to all intents and purposes as any person taking a distress for rent may now do off the premises by virtue of the statutes 2 Will. & Mary, sess. 1, c. 5, and 4 Geo. II. c. 28, &c. And that it shall be lawful for any person or persons whatsoever to come and go to and from such place or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry off or remove the same on account of the purchaser thereof; and that if any pound breach or rescous shall be made of any goods, or chattels or stock distrained for rent and impounded, or otherwise secured by virtue of this Act, the person or persons aggrieved thereby shall have the like remedy as in cases of pound breach or rescous is given and provided by the said statute."

Alteration by 11 Geo. 2, c. 19, s. 10.

Impounding on the premises.

Upon this statute, which is the law now in force with regard to the impounding a distress for rent, it has been held that the landlord ought not to deprive the tenant of the enjoyment of his whole house, or even interfere with it. If the distress be impounded on the premises, the provisions of the statute must be strictly complied with:

Decisions on this statute.

Duties of distrainor.

(*i*) Smith, L. & T. 3rd ed. 259.

the distrainor ought either to put all the goods distrained in one room, and keep possession of that only, or to remove such goods out of the house in the absence of any consent to the contrary. But two or three rooms may be used, if necessary, as may appear most fit and convenient (*k*).

What is an impounding.

It may be difficult, since the passing of the statute, to say *what is an impounding*. Formerly there was no such difficulty, because it was necessary to remove the goods from off the premises; but the statute seems plainly to involve the necessity of the party doing some act to denote the impounding or securing; and the most easy and proper way is to leave a man in possession (*l*).

Removal of goods to public auction room.

We may here mention that by the Law of Distress Amendment Act, 1888, s. 5, the tenant can, by request in writing, oblige the landlord to remove the goods, for the purposes of sale, to a public auction room, or to some other fit and proper place specified in such request, to be there sold. But if the tenant do this, he must pay the expenses of such removal; and he is liable for any damage that the goods may sustain.

Assent to impounding.

An implied assent to the impounding on the part of the owner is sufficient (*m*), and very slight evidence will support it (*n*).

As where the only evidence of assent was that the plaintiff had said, "how much she was obliged to Mr. M., who had acted like a gentleman" (*o*), or where the tenant called the same day, and thanked the distrainor for the way in which the distress had been made (*p*).

(*k*) *Woods* v. *Durrant*, 16 M. & W. 149.

(*l*) *Tennant* v. *Field*, 8 El. & Bl. 336. See the argument of Sir W. Follett in *Swan* v. *Earl of Falmouth*, 8 B. & C. 456, cited therein.

(*m*) It is, of course, advisable that the assent should be in writing, and in express terms. Bullen, 147.

(*n*) *Washbourn* v. *Black*, 11 East, 405.

(*o*) *Ibid.*

(*p*) *Tennant* v. *Field*, 8 El. & Bl. 336.

Where a landlord made a distress in a cottage and locked up the premises altogether, it was held, that if the locking up of the cottage were done to secure the goods, the landlord had a right to do it, as he might impound the goods on the premises and lock them up in order to secure them (*q*) ; but it seems that the distrainor cannot lock up the whole of the premises distrained upon, so as to exclude the tenant therefrom, except with the tenant's express consent. Rather than do that he must remove the goods distrained (*r*).

Tenant cannot be entirely excluded.

It has been held that an open field is a sufficient pound for cattle (*s*).

What is a sufficient impounding.

Again, with regard to the question of what is a sufficient impounding—where a bailiff went on to a field where the tenant's cattle were, touched one of the beasts on the side, and said he distrained for rent, and took a list of the cattle, but made no change whatever in their situation and position, leaving the gate of the field unlocked as he found it; and he then gave notice of the distress to the tenant, and said he would sell in five days if the rent were not paid, the notice stating that the cattle were impounded on the premises, but not saying where, and the bailiff remained in charge of the cattle for some time, and when he left was succeeded by another person; it was held that, under these circumstances, the impounding of the cattle was complete and perfect from the time of giving notice to the tenant (*t*). But where an officer distrained the goods of a lodger, and continued in possession for eight hours, saying that he would remain in possession five days if the money was not paid; it was held that this was not an impounding, but that it was a question for the jury whether

(*q*) *Cox* v. *Painter*, 7 C. & P. 767. See remarks on this case, Bullen, 147.

(*r*) *Smith* v. *Ashforth*, 29 L. J. Ex. 259.

(*s*) *Castleman* v. *Hicks*, 1 C. & M. 266; Woodfall, L. & T. 10th ed. 429.

(*t*) *Thomas* v. *Harris*, 1 M. & G. 695; *Firth* v. *Purvis*, 5 T. R. 432.

he had remained an unreasonable time for the removal of the goods (*u*).

Horses grazing on the side of a turnpike-road with a man in charge of them, they being under his control, are not liable to be impounded, as "wandering, straying, or lying" about the road under 4 Geo. IV. c. 95, s. 75 (*x*).

As has been seen, at common law all the things distrained were required to be impounded off the premises; and since the statute 11 Geo. II. c. 19, s. 10, they may be impounded either off or on at the option of the distrainor. This option, though applicable to everything distrainable at common law, is subject to some exceptions, which we have noticed before (*y*). Thus, by the statute 2 Will. & Mary, sess. 1, c. 5, s. 3, persons are empowered to seize and secure sheaves, or cocks of corn, &c., and to lock up or detain the same in the place where found, in the nature of a distress, until replevied, and in default of replevying to sell the same, so that such corn, &c., be not removed by the persons distraining, to the damage of the owner thereof, *out of the place where the same shall be found* and seized, but be kept there (as impounded) until the same shall be replevied, or sold, in default of replevying the same, within the time aforesaid. These objects of a distress, therefore, are incapable of removal, and must be impounded *on* the premises (*z*).

2 Will. & Mary, sess. 1, c. 5, s. 3.

Again, by the statute 11 Geo. II. c. 19, s. 8, it is enacted that "the landlord may take and seize as a distress for arrears of rent any cattle or stock of their respective tenant or tenants feeding or depasturing upon any common, appendant or appurtenant, or in anyways belonging to all or any part of the premises demised, or holden, and also to take and seize all sorts of corn and grass, hops, roots,

11 Geo. 2, c. 19, s. 8.

(*u*) *Peppercorn* v. *Hofman*, 12 L. J. Ex. 270.
(*x*) *Morris* v. *Jeffries*, L. R. 1 Q. B. 261.
(*y*) *Ante*, p. 138.
(*z*) Per Parke, B., 1 M. & W. 448; Bullen, 148.

fruits, pulse, or other product whatsoever which shall be growing on any part of the estates so demised or holden, as a distress for arrears of rent; and the same to cut, gather, make, cure, carry, and lay up, when ripe, in the barns, or other proper place on the premises so demised or holden: and in case there shall be no barn or proper place on the premises so demised or holden, then in any other barn, or proper place, which such lessor or landlord, lessors or landlords, shall hire or otherwise procure for that purpose, and as near as may be to the premises, and in convenient time to appraise, sell, or otherwise dispose of the same, towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement, and sale, in the same manner as other goods and chattels may be seized, distrained, and disposed of, and the appraisement thereof to be taken when cut, gathered, cured, and made, and not before."

When cattle or stock can be impounded *off* the premises.

And, therefore, the things made distrainable by this statute cannot be impounded *off* the premises, *except* in default of there being a proper place upon the premises for that purpose (*b*).

(2) Appraisement.

Such is the law with regard to the *impounding* of a distress; and we have now to turn our attention to what becomes of it after it has been impounded. As we have stated before, at common law a distress was considered to be a mere pledge, the landlord not being in anyway able to dispose of it. He had merely the right to *detain* it until his rent was paid. This, as may be imagined, was unjust both to the landlord and the tenant; for the landlord did not always procure the satisfaction of his rent on the one hand; whilst, on the other, the tenant was often deprived of his means of satisfying it. It was, therefore, thought necessary to alter this grievance; and accordingly the statute 2 Will. & Mary, sess. 1, c. 5, s. 2, was passed, which enacted that "where any goods or chattels shall be

2 Will. & Mary, sess. 1, c. 5, s. 2.

(*b*) Per Parke, B., 1 M. & W. 449: Bullen, 148.

distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not within five days (c) next after such distress taken, and notice thereof (with the cause of such taking) left at the chief mansion house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained *to be appraised* by two sworn appraisers (whom such sheriff, under-sheriff, or constable, are hereby empowered to swear) to appraise the same truly, according to the best of their understandings; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use."

Notice and sale of distress.

Appraisement.

Before discussing this statute it is necessary for us to state that the statute 35 & 36 Vict. c. 92, s. 13 (d), repeals "so much of the statute 2 Will. & Mary, c. 5, as requires any sheriff, under-sheriff, or constable, to be aiding and assisting at any distress for rent, or to swear any appraiser thereat"; and under the same section "no oath is now to be required from such appraiser" (e).

Appraisers need not be sworn.

(c) See 51 & 52 Vict. c. 21, s. 6, *post*, pp. 249, 250.

(d) The Parish Constables Act, 1872.

(e) Smith, L. & T. 3rd ed. 263.

Part I. Chap. VI.

Law of Distress Amendment Act, 1888.

Another change has also been effected by the Law of Distress Amendment Act, 1888 (*f*), which by sect. 5 enacts that "so much of an Act passed in the second year of the reign of their Majesties King William the Third and Mary, chapter 5, as requires appraisement before sale of goods distrained, is hereby repealed, except in cases where the tenant or owner of the goods and chattels by writing requires such appraisement to be made (*g*), and the landlord or other person levying a distress may, except as aforesaid, sell the goods and chattels distrained, without causing them to be previously appraised; and for the purposes of sale the goods and chattels distrained shall, at the request in writing (*h*) of the tenant or owner of such goods and chattels, be removed to a public auction room, or to some other fit and proper place specified in such request, and be there sold. The costs and expenses of appraisement, when required by the tenant or owner, shall be borne and paid by him; and the costs and expenses attending any such removal, and any damage to the goods and chattels arising therefrom, shall be borne and paid by the person requesting the removal."

It will be seen that a great change has been effected by this section with regard to the appraisement of the goods before sale. It is now no longer essential that an appraisement should take place, except where the tenant or owner of the goods and chattels by writing requires this to be done. But, inasmuch as appraisement is still necessary, when required, and the landlord will render himself liable to an action for irregular distress if he does not conform to such request, the authors deem it necessary to state the former law upon the subject. We may note that the object of an appraisement is for the protection of the landlord in

(*f*) 51 & 52 Vict. c. 21, which, by sect. 9, repeals an almost similar provision contained in the Agricultural Holdings (England) Act, 1883, s. 50.

(*g*) For form of request, see App. A. (9).

(*h*) For form of request, see App. A. (10).

case of a sale alleged to be at an undervalue, since goods sold at the appraised value are presumed to be sold at "the best price." It seems, therefore, unlikely that tenants will be disposed to request an appraisement, especially as they will have to pay the costs if they do so.

No time is specified within which either of these requests must be made. It may be either up to the period allowed for replevying the goods, or up to the time of their actual sale.

Stamp.

The appraisement, when required (*i*), must be properly stamped under 33 & 34 Vict. c. 97, s. 38, which enacts by sub-sect. 1, that "Every appraiser by whom an appraisement or valuation is made shall within fourteen days from the making thereof write out the same in words and figures, showing the full amount thereof, *upon duly stamped material;* and if he neglects or omits so to do, or in any other manner delivers out or states the amount of any such appraisement or valuation, shall forfeit the sum of 50*l.*"

Penalties.

And by sub-sect. 2, "Any person who receives from any appraiser, or pays for the making of any appraisement or valuation, unless the same be written out and stamped as aforesaid, shall forfeit the sum of 20*l.*"

By the schedule to this statute the following stamp duties are made payable on appraisements and valuations made on and after the 1st day of January, 1871.

Where the amount of the appraisement or valuation does not exceed 5*l.*	£ 0	*s.* 0	*d.* 3
Exceeds 5*l.* and does not exceed 10*l.*	0	0	6
„ 10*l.* „ „ 20*l.*	0	1	0
„ 20*l.* „ „ 30*l.*	0	1	6
„ 30*l.* „ „ 40*l.*	0	2	0
„ 40*l.* „ „ 50*l.*	0	2	6
„ 50*l.* „ „ 100*l.*	0	5	0
„ 100*l.* „ „ 200*l.*	0	10	0
„ 200*l.* „ „ 500*l.*	0	15	0
„ 500*l.*	1	0	0

(*i*) For form of appraisement, see App. A. (11).

Part I. Chap. VI.

Appraisers need not be sworn.

It will be seen from the statute 35 & 36 Vict. c. 92, s. 13, that it is no longer necessary that the two appraisers should be sworn. Doubts have arisen whether it is necessary that before the distress can be sold the appraisement should be made by *two* appraisers; and the decisions upon this point seem to be conflicting; the law, moreover, on the subject having been rendered still more complicated by the statute 57 Geo. III. c. 93, which in the schedule "for regulating the expenses of distresses for rent not exceeding 20*l.*" speaks of an appraisement "by *one* broker or more." In the case of *Fletcher* v. *Saunders* (*k*), it was held that one broker was sufficient, but that case seems to have been overruled by a later decision, where in a distress for rent not exceeding 20*l.* it was held that the statute 57 Geo. III. c. 93, does not repeal the provisions of 2 Will. & Mary, c. 5, s. 2, with regard to appraisements, so as to make an appraisement by one broker sufficient upon such distress (*l*).

Number of appraisers required.

It was formerly a condition precedent required by the statute that the appraisement should be made, and until such appraisement was made the landlord had no right to sell, but only to keep the goods (*m*). Now, however, as we have remarked above, no appraisement is necessary unless required (*n*).

If the landlord sells the goods without an appraisement, in spite of the tenant's request that an appraisement should be made, it is an irregularity within the statute 11 Geo. II. c. 19, s. 19, under which provision the tenant will be entitled to recover satisfaction for the damage actually done, and no more; that is to say, the difference between the fair value of the goods to him and the amount of rent discharged by the produce of the sale (*o*). The appraisers

Appraisers

(*k*) 6 C. & P. 747.

(*l*) *Allen* v. *Flicker*, 10 Ad. & Ell. 640; *Bishop* v. *Bryan*, 6 C. & P. 484.

(*m*) *Notts* v. *Curtis*, 5 C. & P. 323.

(*n*) 51 & 52 Vict. c. 21, s. 5.

(*o*) *Biggins* v. *Goode*, 2 Cr. & Jer. 364; *Notts* v. *Curtis*, *supra*.

must be competent.

must be reasonably competent, but need not be professional appraisers (*p*). They must also be disinterested in the distress; and therefore the goods must not be appraised by the party making it. Thus, neither the landlord nor his bailiff can act as one of the appraisers, for they are interested parties (*q*). So where a landlord, who was a broker, having distrained goods for rent, was sworn one of the appraisers, and together with another broker valued them to the plaintiff, who became the purchaser according to such valuation; it was held that the sale was irregular (*r*); for all these persons are not only interested in the business, but are expressly excluded by the terms of the statute, which says that "he, with the sheriff, &c., shall cause the goods to be appraised by two sworn appraisers" (*s*). If a person who has acted as the agent of a landlord in the matter of a distress is one of the appraisers, a sale of the goods distrained is irregular; and in an action for such sale the measure of damages is the full value of the goods to the tenant at the time of the distress, less the amount due for rent (*t*). And a landlord cannot sell the goods to himself. So where goods belonging to A. were assigned by a bill of sale to the defendant, and were afterwards seized by A.'s landlord for arrears of rent, and the goods were appraised, but not sold, the landlord taking them at the appraised value in discharge of his rent, and giving them to the plaintiff (A.'s daughter), and the defendant afterwards seized them under his bill of sale; it was held that the right of property in the goods remained in the tenant till sale, and the taking of such goods by the landlord was not equivalent to a sale; and it was also held that the landlord acquired no property in

(*p*) *Roden* v. *Eyton*, 6 C. B. 427; *Clarke* v. *Holford*, 2 C. & K. 540; *Child* v. *Chamberlain*, 5 B. & Ad. 1049.

(*q*) *Westwood* v. *Cowne*, 1 Stark. 172; *Andrews* v. *Russell*, Bull. N. P. 81.

(*r*) *Lyon* v. *Weldon*, 2 Bing. 334.

(*s*) Bullen, 157.

(*t*) *Rocke* v. *Hills*, 3 Times Law Rep. 298.

Part I. Chap. VI.

them, and consequently could transmit none to the plaintiff (*u*).

The person distrained upon may, if he choose, dispense with the above-mentioned formalities which are required by law. So that in a case where the tenant, in order to save expense, requested that appraisers might not be called in, and in consequence the broker, who made the seizure, himself valued the goods; it was held that he could not afterwards complain of that as an irregularity which had been done at his own instance (*x*).

View and valuation.

After the appraisers have been appointed they must proceed to view and value the goods; and they usually write their appraisement upon the inventory, which should be signed by them (*y*).

Where goods were distrained, and at the end of five days appraised, but not sold, the act of appraisement did not take away the tenant's right to replevy them (*z*). After a sale the purchaser has a right to take the goods and retain them, but *until* a sale it is competent to the tenant to replevy them (*a*).

In an action for selling goods distrained for rent without appraisement, the measure of damages is the real value of the goods sold minus the rent due (*b*).

(*j*) Sale.

As we have seen, until the goods are duly sold, the property in them remains vested in the tenant or other owner (*c*). So if cattle distrained die during the distress, the loss is that of the tenant and not of the landlord (*d*).

(*u*) *King* v. *England*, 4 B. & S. 782.

(*x*) *Bishop* v. *Bryant*, 6 C. & P. 484.

(*y*) Woodfall, L. & T. 12th ed. 445. For form of appraisement, see App. A. (11).

(*z*) *Jacob* v. *King*, 5 Taunt. 451.

(*a*) Per Gibbs, C. J., in *Jacob* v. *King*, *supra*.

(*b*) *Knight* v. *Egerton*, 7 Ex. 407; *Whitworth* v. *Maden*, 2 C. & K. 517.

(*c*) *King* v. *England*, *supra*; *Moore* v. *Pyrke*, 11 East, 52, 54.

(*d*) *Moore* v. *Pyrke*, *supra*.

The statute 2 Will. & Mary, sess. 1, c. 5, s. 2, is not compulsory; the provision by which the landlord "shall and may lawfully sell the goods distrained" being permissive, and therefore no action lies for his not selling. It has also been held that where goods are sold under a distress, and the proceeds are insufficient to satisfy the rent due, the landlord has a remedy by action or counterclaim for the balance (*e*). So that if the landlord thinks fit, instead of proceeding to sell the distress, he may forbear to do so, and merely retain it as a pledge, as at common law (*f*).

But it seems that a different construction must be put upon the provisions of sect. 3 of the statute 2 Will. & Mary, and those of sect. 8 of the statute 11 Geo. II. c. 19; and, therefore, a distress under these sections of corn and hay and other produce *must* be sold (*g*); for as these things were previously exempted from distress at common law on account of their perishable nature, and it was the conferring of the power to sell alone which admitted of their being distrained, it became necessary to make the sale compulsory of things which were declared to be distrainable only *in respect of such sale* (*h*).

Law of Distress Amendment Act, 1888, s. 6.

It will be observed that the sale was not to take place unless the tenant omitted to replevy *within five days after the distress;* but this period is now altered by the Law of Distress Amendment Act, 1888 (*i*), which by sect. 6 enacts that "the period of *five days* provided in the said Act of William and Mary, chapter 5, within which the tenant or owner of goods and chattels distrained may replevy the

(*e*) *Philpott* v. *Lehain*, 35 L. T. N. S. 855.

(*f*) *Hudd* v. *Ravenor*, 2 B. & B. 662; *Lear* v. *Edmonds*, 1 B. & Ald. 157; *Lingham* v. *Warren*, 2 B. & B. 36.

(*g*) Per Parke, B., 1 M. & W. 448; *Piggott* v. *Birtles*, 1 M. & W. 441.

(*h*) Bullen, 153.

(*i*) 51 & 52 Vict. c. 21, s. 6, repealing a similar provision under sect. 51 of the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61). For form of request, see App. A. (8).

Part I. Chap. VI.

same, shall be extended to a period of *not more than fifteen days* if the tenant or such owner make a request (*j*) in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional cost that may be occasioned by such extension of time: Provided that the landlord or person levying the distress may, at the written request, or with the written consent, of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid."

Observations on sect. 6.

Some doubts may arise as to the interpretation of this section. It will be noticed that it does not repeal the provisions of the statute of William and Mary with regard to the period of five days; it only provides that such a period shall be extended at the tenant's request, no time being mentioned when the request is to be made.

If the tenant makes no such request, the conclusion seems to be that the old rule as to five days stands, and the tenant must replevy within that period; but if the proviso is considered, it will be seen that the landlord may, at the tenant's request, sell "at *any time* before the expiration of such extended period as aforesaid." This seems to imply that, if the tenant had made a request, and fixed a period for selling beyond the five days, the landlord could then, with the tenant's further consent, alter the period fixed upon, and sell *within* the five days.

Another point arises—viz., what is the meaning of the words "such extended period as aforesaid?" Do they refer to the time which the tenant fixes as the extension which he wishes, or to any period "of not more than fifteen days" as mentioned in the section?

The authors submit that the former is the view intended by the legislature. To give an instance: if a tenant writes to his landlord and asks for the time to be extended to ten days, the landlord cannot sell within those ten days. But

(*j*) See note (*i*), *supra*.

if the tenant subsequently requests the landlord to alter this period to six days (or even to four days) the landlord may sell the goods at either of these periods. If the other view be taken as to the meaning of the words "such extended period as aforesaid," the parties will be able to alter their period originally fixed upon of ten days to any time between the ten and the fifteen days mentioned by the section.

Inasmuch as the provisions respecting the five days under the statute of William and Mary have not been repealed, but only extended, it is necessary to state the decisions with regard to them.

It has been held (under the repealed sect. 51 of the Agricultural Holdings (England) Act, 1883) that the words "other person levying the distress" do not apply to the bailiff, as he cannot be the person to decide whether the goods are to be sold or not.

That is a transaction which must take place between the tenant and the person who puts the law in motion, and, by himself or his agent, levies the distress (*k*).

How the five days are to be reckoned.

It was at one time thought that these five days were inclusive of the day of sale (*l*); but it was held subsequently that the days were to be reckoned exclusively of the day of taking and notice, and also exclusively of the day of sale (*m*). The new Act does not specify that the fifteen days must be fifteen *clear* days, which was no doubt intended.

Therefore, where a distress had been taken, and notice thereof given on the Saturday, the five days expired on the following Thursday, and the goods could not be lawfully sold before Friday (*n*).

(*k*) See *Coode* v. *Johns*, 17 Q. B. D. 714, *post*, p. 260, per Grove, J.

(*l*) *Wallace* v. *King*, 1 H. Black. 13.

(*m*) *Robinson* v. *Waddington*, 13 Q. B. 753. But in the Queen's Bench it is said that they are to be reckoned inclusively of the last day, and exclusively of the day of taking, overruling *Wallace* v. *King*, *supra*.

(*n*) *Ibid.*

Where a distress was taken on a Monday or Tuesday it could not be lawfully sold until the following Monday (*o*).

Where a distress was made on the afternoon of Friday at 2 p.m., and a sale on the morning of the Wednesday following at 11 a.m., it was decided to be wrongful (*p*). Should the distrainor choose to sell as well as to impound the goods upon the premises, he was not obliged to remove them immediately on the expiration of the five days, unless he chose to do so; but he was allowed by law a reasonable time afterwards for appraising and selling them, and it was a question for the jury to say "what was a reasonable time" (*q*). If, however, he suffered them to remain beyond such reasonable time, or in case they were to be sold off the premises, or were not to be sold at all, but were merely to be retained as a pledge, and were not removed at the end of the five days (unless the tenant's consent to their remaining were obtained), he became a trespasser (*r*). And, therefore, where a person entered under a warrant of distress for rent in arrear, and continued in possession of the goods on the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress; it was held that he was liable to an action of trespass for continuing on the premises, and disturbing the plaintiff in the possession of his house after the time allowed by law (*s*).

Actual damage must be proved.

The landlord could not sell before the expiration of the five days; but in an action for selling the goods before the five days had elapsed, the plaintiff could only recover if he had sustained actual damage (*t*).

And although standing corn and growing crops seized

(*o*) *Lucas* v. *Tarleton*, 3 H. & N. 116.

(*p*) *Parker* v. *Taswell*, 6 C. & P. 166.

(*q*) *Pitt* v. *Shew*, 4 B. & Ald. 208; *Philpott* v. *Lehain*, 35 L. T. N. S. 855.

(*r*) *Griffin* v. *Scott*, 2 Lord Raym. 1424.

(*s*) *Winterbourne* v. *Morgan*, 11 East, 395; *Etherton* v. *Popplewell*, 1 East, 139.

(*t*) *Lucas* v. *Tarleton*, 3 H. & N. 116. See also *Rogers* v. *Parker*, 18 C. B. 112.

as a distress for rent cannot be sold before they are ripe, for the tenant may tender the rent before they are ripe (*u*), it has been held that where a person seized the plaintiff's growing wheat, and sold it on the premises in a growing state, and a purchaser cut and carried it away, and the surplus proceeds, after satisfying the rent, were paid over to the plaintiff, who according to the jury sustained no damage by the transaction; he was not entitled to recover even nominal damages (*x*).

Previously to the Act of 1888, it frequently happened that it was to the tenant's advantage that the goods should not be sold as soon as the law permitted; for by so doing he had a longer time for redeeming them by paying the rent, or the subsequent sale of them might be enhanced by advertisements, &c.; and in such cases, if they were impounded on the premises, it was usual for the tenant to give a consent for their remaining there for a longer period in the custody of the distrainor. If such consent were given, it was considered prudent, though not absolutely necessary, to have it in writing (*y*). If a landlord who had distrained for rent did not sell within the five days by arrangement between himself and the tenant, that was no proof *per se* of collusion (*z*). Where goods were distrained and impounded, and there was a sub-demise to an under-tenant or lodger, and they were intended to be kept there beyond five days, it was held that the object of such consent (*i. e.*, to prevent a trespass) must be borne in mind, and the consent of all persons obtained on whom a trespass would otherwise be committed. After such a consent on the part of the tenant the goods could not be sold before the expiration of the time agreed upon (*a*); but this has now been altered.

Consent by tenant for goods to remain on the premises.

(*u*) *Owen* v. *Leigh*, 3 B. & A. 470; *Proudlove* v. *Twemlow*, 1 Cr. & M. 326.

(*x*) *Rogers* v. *Parker*, 18 C. B. 112; distinguishing *Owen* v. *Leigh* and *Proudlove* v. *Twemlow*, *supra*.

(*y*) Bullen, 155. For form of request, see Appendix A. (8).

(*z*) *Harrison* v. *Barry*, 7 Price, 690.

(*a*) Bullen, 155.

Part I. Chap. VI.

Where a landlord, at the request of the tenant, detained the goods of a lodger upon the premises beyond the proper time of selling, he was held not to be liable to an action at the suit of the lodger if he did not know which were the goods of the lodger and which those of his tenant (*b*).

The landlord could not sell the goods after tender of the rent and costs made at any time within the five days (*c*).

Search in County Court for replevins.

Before any sale takes place, the office of the County Court of the district should be searched to ascertain if the goods have been replevied; and if that is not the case, and the rent and charges are still unpaid at the expiration of the time allowed by law, the goods should be sold for the best price that can be got for them. If the distress is for a less amount than 20*l.*, the persons selling the goods by auction need not have an auctioneer's licence (*d*).

Landlord may not buy.

As we have seen before, a landlord cannot sell the goods to himself, or take them at the appraised price (*e*). When the goods are valued, it is not unusual for the appraisers to buy them at their own valuation (*f*). It was formerly held that if sold at the appraised price, the goods were presumed to have been sold at the best price (*g*); but the ground of this decision was that the law placed reliance upon the fact of the appraisers having been sworn; and as this rule no longer holds, appraisement now is only *primâ facie* evidence of the value (*h*). The plaintiff may go into evidence to show that the goods were not sold at the best price by being allowed to stand in the rain, and that

Meaning of "best price."

(*b*) *Fisher* v. *Algar*, 2 C. & P. 374.

(*c*) *Johnson* v. *Upham*, 2 Ell. & Ell. 250.

(*d*) 8 & 9 Vict. c. 15, s. 5.

(*e*) *King* v. *England*, 4 B. & S. 782, *ante*, p. 247.

(*f*) This course, however, should only be adopted when the value of the goods is small.

(*g*) *Walter* v. *Rumball*, 1 Lord Raym. 53; and see *Efford* v. *Burgess*, 1 Moo. & Rob. 23.

(*h*) *Cook* v. *Corbett*, 24 W. R. 181. For form of statement of claim for not selling at the best price, see App. A. (20).

they were improperly allotted (*i*). In another case it was held that the price realised at a sale by auction is *primâ facie* evidence of the value of the goods (*k*). Care must be taken not to sell anything which was not actually distrained (and of what the distress consisted the inventory is evidence), otherwise the distrainor will render himself liable (*l*).

No order need be observed in sale.

It is not necessary to observe any particular order on the sale of goods distrained; so that though beasts of the plough cannot be lawfully distrained when there is any other sufficient distress on the premises, yet, if they are once distrained, it is not necessary to postpone their sale to that of the other goods (*m*).

Restrictive covenants.

Where a tenant is under covenant not to carry hay and straw off the premises, it was formerly held that the landlord was entitled to dispose of them subject to such covenant (*n*). But this is not so now; and such a restriction cannot be legally imposed by the landlord, because otherwise he would not be selling the goods at the best price. If he does so, he will be liable to an action by the tenant (*o*).

If goods on the tenant's lands are sold under a distress, with a condition, to which the tenant is a party, that they may remain on the land up to a certain day, and that the buyer may enter and take the goods, the tenant cannot revoke the licence to enter on the lands (*p*).

(*i*) *Poynter* v. *Buckley*, 5 C. & P. 512.

(*k*) *Rapley* v. *Taylor*, 1 C. & E. 150.

(*l*) *Sims* v. *Tuffs*, 6 C. & P. 207; *Bishop* v. *Bryant*, 6 C. & P. 484.

(*m*) *Jenner* v. *Yolland*, 6 Price, 5; Bullen, 161.

(*n*) *Abbey* v. *Petch*, 8 M. & W. 419; *Wilmot* v. *Rose*, 3 E. & B. 563.

(*o*) *Ridgway* v. *Lord Stafford*, 6 Exch. 404 (overruling *Abbey* v. *Petch*, *supra*); *Frusher* v. *Lee*, 10 M. & W. 709; *Hawkins* v. *Walrond*, L. R. 1 C. P. D. 280; *Jones* v. *Hamp*, 10 M. & W. 700.

(*p*) *Wood* v. *Manley*, 11 A. & E. 34; *Wood* v. *Leadbitter*, 13 M. & W. 838; Woodfall's L. & T. 12th ed. 447.

Part I. Chap. VI.

But such a licence is not implied by law, though the goods may have remained on the land with the tenant's assent (*q*).

(k) Expenses of a distress for rent.

We have seen that, by the terms of the statute 2 Will. & Mary, sess. 1, c. 5, s. 2, the distrainor may deduct from the amount of the produce of the goods sold, besides the rent, all *reasonable charges* attending the distress (*r*). It is now provided by the Law of Distress Amendment Act, 1888 (*s*), that "the costs and expenses of appraisement, when required by the tenant or owner, shall be borne and paid by him; and the costs and expenses attending the removal of the goods to a public auction room, and any damage to the goods and chattels arising therefrom, shall be borne and paid by the person requesting the removal."

It is worth observing that this power of requiring an appraisement is given not only to the tenant, but to the owner of the goods distrained. So if the owner of a part of the goods requires an appraisement, he will have to pay all the costs of the appraisement both of his own goods and of the tenant's goods; as *all* the goods distrained must be appraised. With regard to the removal of the goods to a public auction room, it will be seen that the Act has omitted to provide that they shall be sold by *auction*.

Formerly the costs of a distress levied for rent not exceeding 20*l.* were regulated by the statute 57 Geo. III. c. 93; but this has been in some respects altered by the Law of Distress Amendment Act, 1888 (*t*). By the rules made pursuant to section 8, sub-section 2, of that Act, it is provided that "no person shall be entitled to any fees, charges, or expenses for levying a distress, or for doing any act or thing in relation thereto other than those speci-

(*q*) *Williams* v. *Morris*, 8 M. & W. 488.

(*r*) *Ante*, p. 243.

(*s*) 51 & 52 Vict. c. 21, s. 5.

(*t*) 51 & 52 Vict. c. 21, s. 8, sub-s. 2.

fied in, and authorized by, the table in Appendix II. to these rules (*u*).

Where the sum is under £20.

Where the rent due does not exceed £20, the fees, charges, and expenses specified in Scale II. shall be allowed.

These are as follows:—	*s.*	*d.*
For levying distress	3	0
For man in possession, 4*s.* 6*d.* per day; to provide his own board in every case.		
For appraisement, on the tenant's written request, whether by one broker or more, 6*d.* in the pound on the value, as appraised, in addition to the amount for the stamp.		
For all expenses of advertisements, if any . .	10	0
Catalogues, sale and commission, and delivery, 1*s.* in the pound on the net produce of the sale.		
For removal, at tenant's request, the reasonable expenses (subject to rule 17) (*x*) attending such removal.		

These new rules do not specify any remedy to a party aggrieved where other or greater costs and charges than those above mentioned have been made. We therefore conclude that the provisions of the statute 57 Geo. III. c. 93, with regard to this, still apply, which by section 2 enacts, "That if any person or persons shall in any manner levy, take, or receive from any person or persons whatsoever, or retain or take from the produce of any goods sold for the payment of such rent, any other or greater costs and charges than are mentioned and set down in the said schedule, or make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, and not really done, it shall be lawful for the party or parties aggrieved by such practices to apply to any one justice of the peace for the county, city, or town, and acting for the division where such distress shall have been made, or in any manner proceeded in, for the redress of his, her, or their grievance so occasioned; whereupon such justice shall summon the person or persons complained of to appear

Party aggrieved may apply to justices of the peace.

(*u*) Rule 15. (*x*) *Post*, p. 261.

Part I. Chap. VI.

before him at a reasonable time to be fixed in such summons, and such justice shall examine into the matter of such complaint by all legal ways and means, and also hear in like manner the defence of the person or persons complained of; and if it shall appear to such justice that the person or persons complained of shall have levied, taken, received, or had other and greater costs and charges than are mentioned or fixed in the schedule hereunto annexed, or made any charge for any matter or thing mentioned in the said schedule, such act, matter, or thing not having been really done, such justice shall order and adjudge treble the amount of the moneys so unlawfully taken to be paid by the person or persons so having acted to the party or parties who shall thus have preferred his, her, or their complaint thereof, together with full costs."

Landlord only liable where he personally levies the distress.

"Provided always (*y*), that nothing herein contained shall empower such justice to make any order or judgment against the landlord for whose benefit any such distress shall have been made unless such landlord shall have personally levied such distress. Provided always, that no person or persons who shall be aggrieved by any distress for rent, or by any proceedings had in the course thereof, or by any costs and charges levied upon them in respect of the same, shall be barred from any legal or other suit or remedy which he, she, or they might have had before the passing of this Act, excepting so far as any complaint to be preferred by virtue of this Act shall have been determined by the order and judgment of the justice before whom it shall have been heard and determined; and which order and judgment shall and may be given in evidence under the plea of the general issue in all cases where the matter of such complaint shall be made the subject of any action."

(*y*) Sect. 4. The Summary Jurisdiction Act, 1884, 47 & 48 Vict. c. 43, s. 4, has repealed sect. 3 of the above Act and parts of sects. 2 and 4.

As the terms of the statute 57 Geo. III. c. 93, are confined to distresses where the sum demanded and due shall not exceed 20*l.*, it did not extend to a case where more than 20*l.* was distrained for, although the goods taken were appraised at and sold for less than 20*l.* (*z*). The costs of the distress in the statute were not confined to the actual distress, but included the subsequent costs of appraisement and sale (*a*).

Effect of statute.

By 7 & 8 Geo. IV. c. 17, "All the rules, regulations, clauses, provisions, penalties, matters, and things in the above Act contained are extended so far as the same are applicable and capable of being put in execution with respect to distresses for land tax, assessed taxes, poor rates, tithes, highway rates, sewer rates, or any other rates, taxes, impositions, or assessments whatsoever, in all cases where the sum demanded or due for or in respect of such taxes, rates, tithes, assessments, or impositions shall not exceed 20*l.*"

7 & 8 Geo. 4, c. 17.

Where the sum distrained for exceeded 20*l.*, there was formerly no rule as to the scale of charges. They were only required to be reasonable (*b*). This has now been provided for by the Law of Distress Amendment Act, 1888 (*c*), which provides that "where the rent due exceeds 20*l.*, the fees, charges, and expenses specified in Scale I. shall be allowed."

Where the sum is over 20*l.*

These charges are:—

For levying distress, three per cent. on any sum exceeding 20*l.*, and not exceeding 50*l.* Two and a-half per cent. on any sum exceeding 50*l.*, and not

(*z*) *Child* v. *Chamberlain*, 5 B. & Ad. 1049.

(*a*) Per Parke, B., in *Hart* v. *Leach*, 1 M. & W. 560.

(*b*) *Hills* v. *Street*, 5 Bing. 37; *Lyon* v. *Tomkies*, 1 M. & W. 603. And see *Heysham* v. *Heskitt, Ex parte Arnison*, L. R. 3 Ex. 56.

(*c*) 51 & 52 Vict. c. 21, which repeals a similar provision under sect. 49 of the Agricultural Holdings (England) Act, 1883.

exceeding 200*l.*; and one per cent. on any additional sum.

For man in possession, 5*s.* per day; to provide his own board in every case.

For advertisements, the sum actually and necessarily paid.

For commission to the auctioneer, on sale by auction, seven and a-half per cent. on the sum realized, not exceeding 100*l.*, five per cent. on the next 200*l.*, four per cent. on the next 200*l.*, and on any sum exceeding 500*l.*, three per cent. up to 1,000*l.*, and two and a-half per cent. on any sum exceeding 1,000*l.* A fraction of 1*l.* to be in all cases reckoned 1*l.*

Reasonable fees, charges, and expenses (subject to Rule 17), where the distress is withdrawn, or where no sale takes place, and for negotiations between landlord and tenant respecting the distress.

For appraisement, on tenant's written request, whether by one broker or more, 6*d.* in the pound on the value as appraised, in addition to the amount for the stamp.

It is necessary here to mention the recent case of *Coode* v. *Johns* (*d*), which was decided under sect. 49 of the Agricultural Holdings (England) Act, 1883, repealed by this Act. In this case it was held that a bailiff appointed under the Act was not entitled to the percentage on the sum distrained for allowed by the schedule for "levying distress," but only to the guinea allowed thereby to the bailiff; Grove, J., remarking, "Now, taking this section by itself, we should certainly never think that the person contemplated by the section was the bailiff, who is not appointed until the 52nd section. Who, then, are the persons contemplated? If we look at the 50th and 51st sections, we find that they speak in several places of the

(*d*) 17 Q. B. D. 714.

'landlord or other person levying the distress.' But if the 'other person' means the bailiff, why is special mention made of the bailiff's fee for levy in the second schedule? In my opinion the bailiff is not the person contemplated in this statute as 'levying the distress.' He does not set the law in motion. He is appointed under the 52nd section of the Act by the County Court judge, and when he levies a distress he for the time acts merely as the servant of the landlord."

This fee of 1*l.* 1*s.* to the bailiff for levy has been omitted in the new scale of charges; and if the above case is still law, the bailiff will not now be entitled to any fee for levying, as he is distinctly stated not to be the person who levies the distress. The effect of the new provision seems to overrule the above case.

In case of any difference as to fees, charges, and expenses between the parties, or any of them, the fees, charges, and expenses shall be taxed by the registrar (*e*) of the district in which the distress is levied. The registrar may make such order as he thinks fit as to the costs of such taxation (*f*). A fee of 10*s.* is payable for such taxation when required if the rent exceeds 20*l.*, and of 5*s.* where it does not exceed 20*l.* (*g*).

Copy of charges.

Formerly every broker was obliged to give a copy of his charges and costs of the distress signed by him to the person on whose goods such distress was levied (*h*). This applied only to cases where the goods had been sold (*i*); and a landlord who did not personally interfere in a distress was not answerable for the neglect of a broker

(*e*) "Registrar" means registrar of a County Court, and each registrar, where there is more than one, and includes a deputy registrar. Law of Distress Amendment Act, 1888, rule 19.

(*f*) Rule 17.

(*g*) Schedule to Treasury Order regulating fees (Law of Distress Amendment Act, 1888).

(*h*) 57 Geo. III. c. 93, s. 6. This applied although the amount of rent demanded exceeded 20*l.*

(*i*) *Hills* v. *Street*, 5 Bing. 39.

Part I. Chap. VI.

employed by him to give a copy of the charges (*k*). But now by the Law of Distress Amendment Act, 1888 (*l*), "A copy of the table of fees, charges, and expenses authorized by the rules under the Act shall be posted up by the registrar in a conspicuous place in his office, and every bailiff levying a distress shall, on the request of the tenant, produce to him a copy of the table."

1 & 2 Phil. & Mary, c. 12, s. 2.

Expenses of impounding.

The statute 1 & 2 Ph. & Mary, c. 12, s. 2, enacts that "no person shall take for keeping in pound, impounding, or poundage of any manner of distress above the sum of fourpence for any one whole distress that shall be so impounded; and where less has been used there to take less; upon the pain of 5*l.* to be paid to the party grieved, over and beside such money as he shall take above the sum of fourpence; any usage or prescription to the contrary in anywise notwithstanding." But this enactment has been held not to extend to cases where the goods are impounded on the premises by virtue of the statute 11 Geo. II. c. 19, s. 10 (*m*).

A bailiff in possession under a distress for rent has no right, after the rent is paid, and the landlord has withdrawn, to sell any of the goods for the payment of his fees and expenses in holding possession (*n*).

Where, on a distress for a church rate, the bailiff made certain charges mentioned in the schedule to 57 Geo. III. c. 93, which charges, however, though incurred, were not applicable to such a seizure; it was held that, as he had not claimed any charges not in the schedule, and had acted *bonâ fide*, he was not liable to the penalty (*o*).

(l) Surplus proceeds and unsold goods.

As we have seen, by the statute 2 Will. & Mary, sess. 1, c. 5, s. 2, landlords are authorized, after giving notice, to

(*k*) *Hart* v. *Leach*, 1 M. & W. 560.
(*l*) Rule 18.
(*m*) *Child* v. *Chamberlain*, 5 B. & Ad. 1049.
(*n*) *Harding* v. *Hall*, 14 L. T. N. S. 410.
(*o*) *Nott* v. *Bound*, L. R. 1 Q. B. 405.

cause the goods and chattels distrained to be appraised and sold "towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, *leaving the overplus* (*if any*) *in the hands* of the said sheriff, under-sheriff, or constable, for the owner's use."

In practice, the overplus is often paid over to the tenant or his agent, and when this is done the tenant cannot complain that it has not been paid over to the sheriff or under-sheriff for his use, since the statute is thereby substantially satisfied (*p*).

If the overplus is not so left, and the landlord is not guilty of any misconduct with regard to the distress, he is not liable in an action for money had and received to recover the overplus money in the landlord's hands. The proper remedy is an action on the case against him for not paying over such overplus to the sheriff pursuant to the statute (*q*).

Meaning of overplus.

The overplus which by this statute was directed to be left in the hands of the sheriff, under-sheriff, or constable, &c., meant the overplus after payment of the rent and *reasonable* charges. Therefore, in an action on the case for not leaving the overplus in the hands of the sheriff, &c., the plaintiff was enabled to question the reasonableness of the charges.

Reasonableness of the charges.

And where the plaintiff himself received from the broker the balance remaining after payment of the rent and the actual charges, making no objection as to their reasonableness; it was held that it was a question for the jury whether he accepted such balance in satisfaction, and if not, whether it was sufficient to satisfy the real balance;

(*p*) Per Lord Abinger, in *Lyon* v. *Tomkies*, 1 M. & W. 606; *Cross* v. *Ayres*, 1 F. & F. 187.

(*q*) *Yates* v. *Eastwood*, 6 Ex. 805; distinguishing *Graham* v. *Tate*, 1 M. & S. 609. And see *Evans* v. *Wright*, 2 H. & N. 527.

but that it was not correct to lay it down as a matter of law that such payment and receipt substantially satisfied the regulations of the statute (*r*). Now, as we have seen above (*s*), provision has been made whereby the charges are fixed, whatever is the amount of the sum distrained for.

And so long as the landlord detains the distress without sale, he cannot maintain an action against the tenant for the rent, even although the goods distrained are not of sufficient value to satisfy the amount of the rent distrained for (*t*). For when the law gives a man two remedies—one by a kind of execution, as by levying a distress, and the other by a personal action—he cannot, if he chooses to resort to the former, have his action so long as the distress is in force (*u*).

But where the goods have been sold, and the proceeds are insufficient to satisfy the rent due, the landlord has a remedy by action or counter-claim for the balance (*x*).

Where goods distrained for rent in arrear have been removed to a convenient place for sale, and sufficient have been sold to satisfy the distress, including the expenses, the proper course is for the broker to leave the surplus money with the sheriff, under-sheriff, or constable, and return the surplus proceeds to the premises from whence he took them (*y*). And this is the case even though they are the goods of third parties, and the bailiff has had notice of this after the impounding, and has promised to act on the notice, both as to the goods unsold, and the surplus proceeds of the goods sold; for such a promise does not impose any duty on the bailiff to deliver the goods to

Return of surplus proceeds.

(*r*) *Lyon* v. *Tomkies*, 1 M. & W. 603; *Knight* v. *Egerton*, 7 Exch. 407; *Simpson* v. *Routh*, 2 B. & C. 682.

(*s*) *Ante*, pp. 257, 259.

(*t*) *Lehain* v. *Philpott*, L. R. 10 Ex. 242.

(*u*) Per Cleasby, B., in *Lehain* v. *Philpott*, *supra*.

(*x*) *Philpott* v. *Lehain*, 35 L. T. N. S. 855.

(*y*) *Evans* v. *Wright*, 2 H. & N. 527.

the right owner. For a landlord distraining exercises a legal right, and may decline, in the exercise of it, to embarrass himself with the rights of third parties. He may restore the goods remaining unsold to the premises from which he removed them, and may leave any stranger who claims them to enforce his right against the tenant. The liability of goods to distress does not depend on the ownership of them, but upon their being found on the premises demised (*z*).

(*z*) Per Pollock, C. B., in *Evans* v. *Wright*, *supra*.

CHAPTER VII.

SATISFACTION OF ARREARS OF RENT BY THE EXECUTION CREDITOR.

Notice by landlord of claim for rent.

8 Anne, c. 14, s. 1.

As we have mentioned before, goods in the custody of the law under an execution cannot at common law be distrained for rent (*a*). The landlord must in such a case give notice to the sheriff in possession of his claim for rent under the statute 8 Anne, c. 14, s. 1, which enacts that "No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life, or lives, term of years, at will, or otherwise, shall *be liable to be taken* by virtue of any execution on any pretence whatsoever, *unless the party at whose suit* the said execution is sued out, shall, *before the removal* of such goods from off the said premises, by virtue of such execution, or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution (*b*), provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this Act; and the sheriff or other officer is hereby empowered and required to levy and pay to the

One year's rent may be claimed.

(*a*) *Ante*, p. 141; *Wharton* v. *Naylor*, 12 Q. B. 673.

(*b*) For forms of notice under this statute, see Appendix A. (12) and (13).

plaintiff as well the money so paid for rent, as the execution money."

Exception in favour of the Crown.

And sect. 8 provides that "Nothing in this Act contained shall extend, or be construed to extend, to let, hinder or prejudice her Majesty, her heirs or successors, in the levying, recovering, or seizing any debts, fines, penalties, or forfeitures due, payable, or answerable to her, but that it shall and may be lawful for her to levy, recover, and seize the same in the same manner as if the Act had never been made" (*c*).

7 & 8 Vict. c. 96, s. 67. Weekly tenancies.

By the statute 7 & 8 Vict. c. 96, s. 67, it is enacted that "No landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

Construction of the 8 Anne, c. 14.

The 8 Anne, c. 14, s. 1, is to be construed liberally (*d*), namely, in favour of landlords. It does not, however, apply to executions at the suit of the landlord (*e*). It extends to those levied on any description of judgment, whether for the plaintiff or the defendant in the action; and so it has been held to apply where a defendant sued out execution for his costs of defence (*f*), and also to the seizure of goods under an outlawry in a civil suit (*g*).

It seems that a sequestration from the Court of Chancery is likewise an execution within the statute, and, therefore,

(*c*) *Attorney-General* v. *Leonard*, 38 Ch. Div. 622.

(*d*) *Henchett* v. *Kimpson*, 2 Wils. 140.

(*e*) *Taylor* v. *Lanyon*, 6 Bing. 536.

(*f*) *Henchett* v. *Kimpson*, *supra*.

(*g*) *Groves* v. *D'Acastro*, Bunb. 194; *St. John's College, Oxford* v. *Murcott*, 7 T. R. 259; Woodfall's L. & T. 12th ed. 455.

in such case the landlord will be entitled to claim a year's rent in preference to other creditors (*h*).

Persons who come under the statute.

A ground landlord is not a person entitled to receive a year's rent within the statute (*i*), but lessees and under-tenants are within the statute, as also are goods in an apartment, which is part of a messuage (*j*). Proceedings in bankruptcy, however, are not within the Act. In such a case the landlord is entitled to distrain (*k*).

Where more than one execution.

Where there are two or more executions on the tenant's goods, the landlord cannot have a year's rent on each, but must demand it out of one only (*l*). If the goods remain on the demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained (*m*).

Notwithstanding a fraudulent bill of sale by the tenant, the property remains vested in him, so as to be liable to an execution against his goods, or a distress (*n*).

Where a sheriff's officer executed a *fi. fa.* by going to the house and informing the debtor that he came to levy on his goods, and laying his hand on a table said, "I take this table," and then locked up his warrant in the table drawer, took the key, and went away without leaving any person in possession, and after the *fi. fa.* was returnable the landlord distrained the goods for rent; it was held that the distress was regular (*o*).

To what the Act applies.

The Act applies to all goods and chattels whatsoever on

(*h*) *Dixon* v. *Smith*, 1 Swanst. 457.

(*i*) *Bennett's case*, Stra. 787.

(*j*) *Thurgood* v. *Richardson*, 7 Bing. 428.

(*k*) *Lee* v. *Lopes*, 15 East, 230; *Gethin* v. *Wilks*, *Gale* v. *Wilks*, 2 Dowl. Rep. 189; *Taylor* v. *Lanyon*, 6 Bing. 536.

(*l*) *Dodd* v. *Saxby*, 2 Str. 1024.

(*m*) *Smith* v. *Russell*, 3 Taunt. 400.

(*n*) *Reed* v. *Thoyts*, 6 M. & W. 410; Woodfall's L. & T. 12th ed. 455.

(*o*) *Blades* v. *Arundel*, 1 M. & S. 711. See *Ex parte Davis*, *In re Pollen's Trustees*, 54 L. T. N. S. 304.

the demised premises, whether belonging to the tenant or not (*p*), and whether liable to a distress or not (*q*).

Where under a writ of *fi. fa.* the sheriff levied on and removed goods which were not the property of the judgment debtor, the owner recovered by action the whole proceeds of the levy. Before the removal of the goods from the premises the sheriff had notice of a year's rent being due, which he did not pay; and it was held that although he had paid the whole proceeds of the levy to the owner of the goods, yet he was liable under this statute for removing them without paying the rent (*r*).

The year's rent must be paid before removal.

Wrongful removal.

The goods may not be removed from off the premises until the year's rent is first paid. The seizure by the sheriff is lawful *primâ facie;* but if the goods are removed without payment of the rent, after notice that it is due, such removal renders the whole proceeding unlawful as regards the landlord, and subjects the sheriff to an action at his suit (*s*), or to a summary application to a division of the High Court out of which the execution issues, or to a judge to compel him to pay the arrears of rent and the costs of the application (*t*), but not an action for money had and received (*u*).

But where the sheriff seizes goods in execution, and assigns to an execution creditor, having notice that a year's rent is due to the landlord, though he may be liable to an

(*p*) *Taylor* v. *Lanyon*, *supra*.

(*q*) *Riseley* v. *Ryle*, 11 M. & W. 16, 19.

(*r*) *Forster* v. *Cookson*, 1 Q. B. 419; *Duck* v. *Braddyll*, 13 Price, 455.

(*s*) *Riseley* v. *Ryle*, 11 M. & W. 16, 19, 20; *Levy* v. *Godson*, 4 T. R. 687; *Calvert* v. *Jolly*, 2 B. & Ad. 418; *Wintle* v. *Freeman*, 11 A. & E. 547; *Forster* v. *Cookson*, 1 Q. B. 419; *Bible* v. *Hussey*, 2 Ir. Com. L. R. 308; *Barshaw* v. *Bullock*, 2 P. & D. 241; *Reed* v. *Thoyts*, 8 Dowl. 410; Watson on the Sheriff, 2nd ed. 277.

(*t*) *West* v. *Hedges*, 6 M. & G. 1004; *Henchett* v. *Kimpson*, 2 Wils. 140; *Arnett* v. *Garnett*, 3 B. & A. 440; *Yates* v. *Ratledge*, 5 H. & N. 249; Woodf. L. & T. 12th ed. 456.

(*u*) *Green* v. *Austin*, 3 Camp. 260.

action, yet such landlord cannot distrain for a year's rent whilst the goods are in the hands of the sheriff, or his assignee (*x*).

Liability of the sheriff.

The sheriff is not liable to an action unless there has been an actual removal of the goods from the premises; and the mere execution of a bill of sale by him to a purchaser is not equivalent to such a removal (*y*). No action lies against the execution creditor for any such removal (*z*).

The statute only applies to existing tenancies.

The statute 8 Anne, c. 14, s. 1, only applies to existing tenancies; and therefore, where the sheriff seized goods of a tenant whilst in possession within six months after the determination of his lease, and sold the goods, paying the proceeds to the creditors without satisfying the landlord's arrears of rent; it was held that the sheriff was not liable to an action; for that the landlord's right to a year's rent under the first section of this statute ceased upon the determination of the lease, although by sects. 6 and 7 he retained a power of distress for six months afterwards (*a*).

Where, in an agreement for a lease for the sale and assignment of certain premises, there was a stipulation "that in the meantime, and until the assignment was made, the intended purchaser should pay and allow to the seller at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase," the intended purchaser having taken possession, and one half-yearly payment having become due for the completion of the purchase; it was held, that it was due *as rent;* and that the sheriff, levying on the

(*x*) *Wharton* v. *Naylor*, 12 Q. B. 673; *Riseley* v. *Ryle*, *supra*.

(*y*) *Smallman* v. *Pollard*, 6 M. & G. 1001; *White* v. *Binstead*, 13 C. B. 304.

(*z*) *Palgrave* v. *Windham*, 1 Stra. 212; *Riseley* v. *Ryle*, *supra*; *Cockers* v. *Musgrove*, 9 Q. B. 230.

(*a*) *Cox* v. *Leigh*, L. R. 9 Q. B. 333; *Saunders* v. *Musgrave*, 6 B. & C. 524; *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88; *Rotherey* v. *Wood*, 3 Camp. 24.

goods of the occupier under a *fi. fa.*, was bound by the statute 8 Anne, c. 14, to pay it over to the seller as landlord (*b*).

Forehand rents.

The Act applies to forehand rents payable in advance (*c*), even when reserved in a mortgage deed, by way of additional security for the interest (*d*). And even although the landlord is aware that an execution is about to be sent down at the suit of an execution creditor, he may distrain for a year's rent (*e*).

Rent to which the landlord is entitled.

The rent to which the landlord is entitled is that which is due for a year *immediately preceding* the execution; and therefore, if the tenant holds under a lease at one rent, and afterwards under a second demise at another, the landlord cannot demand the amount of a year's rent unpaid upon the expired lease (*f*). He is entitled to a full year's rent, if in arrear, notwithstanding that he has sometimes remitted some portion of it to the tenant (*g*), and without any deduction for poundage (*h*). But he can only claim the rent which was actually in arrear at the time of the execution, and not such as may accrue due after the taking and during the continuance of the sheriff in possession (*i*). So where a sheriff takes corn in the blade, and sells it before rent is due, he is not liable to account to the landlord for rent accruing *subsequently* to the levy and sale, although he has notice, and the corn be not removed until long afterwards, when a considerable proportion of rent

(*b*) *Saunders* v. *Musgrave*, 6 B. & C. 524. See also *Hamerton* v. *Stead*, 3 B. & C. 478; *Anderson* v. *Midland Rail. Co.*, 3 El. & El. 614.

(*c*) *Harrison* v. *Barry*, 7 Price, 690; *Duck* v. *Braddyll*, 13 Price, 455.

(*d*) *Yates* v. *Ratledge*, 5 H. & N. 249.

(*e*) *Harrison* v. *Barry*, *supra*.

(*f*) *Cook* v. *Cook*, Andr. 219.

(*g*) *Williams* v. *Lewsey*, 8 Bing. 28.

(*h*) *Gore* v. *Goston*, 1 Stra. 643; *Collyer* v. *Spear*, 4 J. B. Moore, 573; *Davies* v. *Edmonds*, 1 D. & L. 395.

(*i*) *Hoskins* v. *Knight*, 1 M. & S. 245. See also *Ex parte Davis*, *post*, p. 272.

has become due. The landlord's remedy in such case is by distress (*j*).

The sheriff of Middlesex seized and sold the goods of a debtor under a writ of *fi. fa.*, and the purchaser allowed the goods sold to remain on the premises for some days. After the removal of the goods, and after a receiving order had been made against the debtor, notice was served upon the sheriff informing him that there were due from the debtor to the landlords two quarters' rent, the first quarter having been due at Christmas, 1884, whereas the execution had been levied in March, 1885, and the two quarters having accrued after the execution and sale, but prior to the removal of the goods by the purchaser, and prior to the receiving order. The sheriff paid over the proceeds of the sale to the trustee in bankruptcy, after deducting the usual costs and charges of execution. Upon an application for an order directing the trustee to pay over to the landlords the two quarters' rent above mentioned out of the proceeds of the sale, the trustee having elected to stand in the shoes of the sheriff, it was held that in relation to the second quarter's rent, the landlords had no claim to relief, since they would have only been entitled to claim from the sheriff the amount due at the time when the writ of execution was issued. It was also held that the landlords might have distrained between the time of the sale by the sheriff and the removal of the goods. It was further held with regard to the first quarter's rent due at Christmas, 1884, that the landlords had missed their opportunity of distraining during the above-mentioned period, and therefore had no claim against the sheriff. If more than a reasonable time elapses between delivery by the sheriff and removal by the purchaser, the landlord is entitled to distrain on goods left upon the premises (*k*).

(*j*) *Gwilliam* v. *Barker*, 1 Price, 274; *Reynolds* v. *Barford*, 7 M. & G. 449.

(*k*) *Ex parte Davis, In re Pollen (Trustees)*, 54 L.T. N.S. 304.

Where a landlord sued a sheriff for not reserving a year's rent on an execution against the tenant, and released the rent after the jury were sworn, in order to make the tenant a witness; it was held that he was not thereby precluded from recovering against the sheriff the amount of rent (*l*).

We have already discussed the provisions of the statutes 56 Geo. III. c. 50, and 14 & 15 Vict. c. 25, with regard to the seizure of crops under an execution (*m*).

Executors and administrators.

An executor or administrator of a deceased landlord is equally entitled under the statute of 8 Anne, c. 14, as the landlord himself (*n*); but not an administrator to whom administration was granted after the goods were sold under an execution (*o*).

Where the sheriff, under a *fi. fa.*, took goods which were not the property of the judgment debtor, and accounted for them to the real owner, it was held, that he was still liable to pay a quarter's rent to the landlord under this statute (*p*). And he is also liable, though he ought not to have seized the goods, because the tenant has become bankrupt, and he may therefore be liable to an action at the suit of the assignees (*q*).

Where, under a *fi. fa.* against A., the sheriff seized the goods of B., and on B. claiming them, obtained an order under the Interpleader Act, and C., the landlord, claimed 25*l.* for a quarter's rent, and the goods were sold under the order, and the amount, after deducting the 25*l.*, paid by the sheriff into Court, and on the trial of the issue B. established his claim; it was held that under the circum-

(*l*) *Thurgood* v. *Richardson*, 7 Bing. 428.

(*m*) See *ante*, pp. 143, 144.

(*n*) *Henchett* v. *Kimpson*, 2 Wils. 140; *Palgrave* v. *Windham*, 1 Stra. 212; *Twells* v. *Colville*, 2 Wils. 377.

(*o*) *Waring* v. *Dewberry*, 1 Stra. 97.

(*p*) *Forster* v. *Cookson*, 1 Q. B. 419.

(*q*) *Duck* v. *Braddyll*, 13 Price, 455.

stances the sheriff was not justified in paying the rent (*r*). And where a tenant had committed an act of bankruptcy in October, 1810, upon which a commission issued on the 21st January, 1811, and the sheriff had on the 7th of January levied an execution at the suit of the landlord for a judgment debt of 600*l.*, under which he sold the goods of the tenant on the 21st and 22nd of January for 520*l.*, and out of that sum, when received, paid the landlord 140*l.*, for one year's rent in arrear; it was held that, the property in the goods being changed by the act of bankruptcy and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and the execution creditor before he had notice of the issuing of the commission; and that as he could not give such proof, he was liable for the amount to the assignees, and was not entitled to deduct the 140*l.* paid over to the landlord for the year's rent, under the statute 8 Anne, c. 14, a commission of bankruptcy not being an *execution* within the meaning of that statute (*s*).

Where property in goods is changed by bankruptcy.

Notice to the sheriff.

It does not seem to be clear whether actual notice should be given to the sheriff of the arrears of rent claimed by the landlord. Such notice is not required in express terms: but inasmuch as the sheriff is not bound to find out what rent is due to the landlord, and pay it him, unless the landlord gives him notice, it would seem to be most necessary that notice should be given (*t*).

But although he have no specific notice, yet where with knowledge that there is rent due to the landlord the sheriff proceeds to sell the tenant's goods without reserving the year's rent, he will be liable for it, even though no specific notice was given him by the landlord (*u*).

(*r*) *White* v. *Binstead*, 13 C. B. 304.

(*s*) *Lee* v. *Lopes*, 15 East, 230.

(*t*) *Smith* v. *Russell*, 3 Taunt. 400; *Waring* v. *Dewberry*, 1 Stra. 97; *Palgrave* v. *Windham*, 1 Stra. 212.

(*u*) *Andrews* v. *Dixon*, 3 B. & Ald. 645; *Gawler* v. *Chaplin*, 2 Exch. 503, 507.

Where an action was brought against the sheriff by an execution debtor for seizing and selling more goods than were sufficient to satisfy the execution, the Court decided against the sheriff expressly on the ground that he had no right to levy for rent without a claim being first made by the landlord (*x*).

Notice to execution creditor unnecessary.

Notice from the landlord to the execution creditor is clearly unnecessary (*y*).

The notice may be given after the removal of the goods, as well as before (*z*).

The law casts on the sheriff, when he has notice or knowledge of the rent due, the responsibility of ascertaining whether such rent is *really* due; for otherwise there might be numerous unfounded claims in order to defeat an execution by a creditor. If, moreover, the execution debtor holds under a lease, the sheriff should, if possible, inspect the lease (*a*); but slight evidence of the fact will be sufficient (*b*).

If the sheriff finds that the goods upon the premises are not sufficient to satisfy a year's rent (*c*), of which he has had notice, or in case the execution creditor refuses to pay the arrears when requested to do so by him, his proper course is to withdraw (*d*); but he should always acquaint the execution creditor, or his solicitor, of the rent in arrear, and request payment (*e*).

(*x*) *Gawler* v. *Chaplin, supra;* Churchill on Sheriffs, 2nd ed. 326. See also, as to notice, *Thurgood* v. *Richardson,* 7 Bing. 428; *Reed* v. *Thoyts,* 6 M. & W. 410; *Bible* v. *Hussey,* 2 Ir. Com. L. R. 308.

(*y*) *Palgrave* v. *Windham, supra.*

(*z*) *Arnitt* v. *Garnett,* 3 B. & Ald. 440; *Yates* v. *Ratledge,* 5 H. & N. 249. The statute has not specified any particular form of the notice. See Appendix A. (12) for form; and *Collyer* v. *Speer,* 2 B. & B. 67.

(*a*) *Augustien* v. *Challis,* 1 Ex. 279.

(*b*) *Cakeleigh* v. *Birch,* 3 Camp. 521, n.

(*c*) *Foster* v. *Hilton,* 1 Dowl. 35.

(*d*) *Cocker* v. *Musgrave,* 9 Q. B. 234.

(*e*) Churchill's Law of Sheriffs, 2nd ed. 333. For form of Notice, see App. A. (13).

Poundage.

The sheriff is entitled to poundage upon the amount levied and paid (*f*).

The amount of rent claimed may be disputed, especially where a large sum is claimed for a penal rent of so much per acre (*g*). The sheriff should always secure legal evidence of the tenancy, and of the arrears of rent due (*h*).

Security for rent.

Where a landlord takes a security of a third person for the rent at the time of the execution, the sheriff is discharged as to the landlord's claim for rent (*i*).

Measure of damages.

In an action under sect. 1 of 8 Anne, c. 14, against the sheriff for removing goods taken in execution without paying the landlord a year's rent, the measure of damages is *primâ facie* the amount of rent due; but it is competent for the sheriff to prove in mitigation of damages that the value of the goods removed was less than the amount of rent due (*k*). All that the landlord has to prove in order to entitle himself to the amount of the rent as damages is, that the rent is in arrear, that the sheriff has had notice of this, and that he has notwithstanding removed the goods. It then lies on the sheriff to show that the value of the goods removed was less than the rent, and so to reduce his liability.

43 Geo. 3, c. 99, s. 37. Taxes.

By the statute 43 Geo. III. c. 99, s. 37, it was provided, "that when duties or taxes were in arrear, no goods could be taken by virtue of any process, &c., except at the suit of the landlord for rent, unless the parties suing should pay the arrears not exceeding one year. In case of refusal the collector might distrain and sell the goods."

Under this statute (*l*) the goods of a third person charged might be distrained, though such goods were only borrowed, and the person in arrear had other goods of his

(*f*) *Davies* v. *Edmonds*, 12 M. & W. 31.

(*g*) *Bateman* v. *Farnsworth*, 29 L. J. Ex. 365.

(*h*) *Augustien* v. *Challis*, 1 Exch. 279; *Keightley* v. *Birch*, 3 Camp. 524.

(*i*) *Rotheray* v. *Wood*, 3 Camp. 24.

(*k*) *Thomas* v. *Mirehouse*, 19 Q. B. D. 563.

(*l*) 43 Geo. 3, c. 99, *supra*.

own on the premises sufficient to satisfy the arrears. The collector had the same rights of distress as a landlord (*m*).

The above statute, however, has been repealed, and now by sect. 88 of the Taxes Management Act, 1880 (*n*), "(1) No goods or chattels whatever belonging to any person at the time any of the duties or the land tax became in arrear shall be liable to be taken by virtue of any execution or other process, warrant or authority whatever, or by virtue of any assignment, on any account or pretence whatever, except at the suit of the landlord for rent, unless the party at whose suit the said execution or seizure shall be sued or made, or to whom such assignment shall be made, shall, before the sale or removal of such goods or chattels, pay or cause to be paid to the collector, all arrears of the said duties or land tax which shall be due at the time of seizing such goods or chattels, or which shall be payable for the year in which such seizure shall be made, provided such duties and land tax shall not be claimed for more than one year.

No goods to be taken except at the suit of landlord for rent unless the party pay arrears.

"(2) In case the duties and land tax shall be claimed for more than one year, then the said party at whose instance such seizure shall have been made, paying the said collector the aforesaid duties and land tax due for one whole year, may proceed in his seizure as he might have done if no duties and land tax had been so claimed; but in case of refusal to pay the said duties and land tax the said collector is hereby authorized and required to distrain such goods and chattels notwithstanding such seizure or assignment, and to proceed to the sale thereof according to this Act, in order to obtain payment of the whole of the said duties and land tax so assessed, together with the reasonable costs and charges attending such distress and sale; and every such collector so doing shall be indemnified by virtue of this Act."

Refusal to pay taxes.

(*m*) *Jenson* v. *Dixon*, 1 M. & S. 601.

(*n*) 43 & 44 Vict. c. 19.

Part I. Chap. VII.

A landlord's right to distrain revives upon an execution being waived (*o*).

Execution under County Court process.

County Courts Act, 1888.

If goods are taken in execution under a County Court warrant the statute 8 Anne, c. 14, s. 1, does not apply; for it is enacted by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 160 (*p*), that "section one of the Act of the eighth year of the reign of Queen Anne, c. 14, shall not apply to goods taken in execution under a warrant of the Court, but the landlord of any tenement in which any such goods shall be so taken *may claim the rent* thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent, which shall state the amount of rent claimed to be in arrear (*q*), and the time for and in respect of which such rent is due; and if such claim be made, the bailiff or officer making the levy shall, *in addition thereto, distrain for the rent so claimed and the costs of such distress*, and shall not within five days next after such distress sell any part of the goods taken, unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale; next, the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case; and, lastly, the amount for which the warrant was issued; and if any replevin be made of the goods so taken the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident

(*o*) *Seven* v. *Mihill*, 1 Lord Ken. 370.

(*p*) Which consolidates the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 75.

(*q*) For form, see Appendix A. (14).

to the sale under the execution, and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant; and the poundage of the high bailiff and broker for keeping possession, appraisement, and sale under such distress shall be the same as would have been payable if the distress had been an execution of the Court, and no other fees shall be demanded or taken in respect thereof."

Goods of a stranger.

If a bailiff, under a warrant of the County Court, seize on the defendant's premises the goods of a stranger, he cannot distrain and sell such goods, under this enactment, for the rent of the landlord. If he does so, the stranger has a perfect right at any time to remove the goods and avoid the distress (*r*).

Notice of rent to sheriff on execution of Admiralty process. Admiralty Court Act, 1861.

If a claim for rent be made upon goods seized under Admiralty process, the judge of the Probate, Divorce, and Admiralty Division adjudicates upon the claim. For it is enacted by the Admiralty Court Act, 1861 (24 & 25 Vict. c. 10, s. 16), that "if any claim shall be made to any goods or chattels taken in execution under any process of the High Court of Admiralty, or in respect of the seizure thereof, or any act or matter connected therewith, or in respect of the proceeds or value of any such goods or chattels, *by any landlord for rent*, or by any person not being the party against whom the process has issued, the registrar of the said Court may, upon application of the officer charged with the execution of the process, whether before or after any action brought against such officer, issue a summons, calling before the said Court both the

(*r*) *Beard* v. *Knight*, 8 El. & Bl. 865; *Foulget* v. *Taylor*, 5 H. & N. 202; *Thornton* v. *Adams*, 5 M. & S. 38; *White* v. *Binstead*, 13 C. B. 304. Where a landlord appears on the hearing of an interpleader summons in a County Court, he, as well as the execution creditor and the claimant, has a right of appeal. *Gage* v. *Collins*, L. R. 2 C. P. 381.

Part I. Chap. VII.

party issuing such process and the party making the claim; and thereupon any action which shall have been brought in any of her Majesty's Superior Courts of Record, or in any local or inferior Court, in respect of such claim, seizure, act, or matter as aforesaid, shall be stayed; and the Court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all proceedings had upon the action after issue of the summons out of the said Admiralty Court; and the judge of the said Admiralty Court shall adjudicate upon the claim, and make such order between the parties in respect thereof and of the costs of the proceedings, as to him shall seem fit; and such order shall be enforced in like manner as any order made in any suit brought in the said Court. Where any such claim shall be made as aforesaid, the claimant may deposit with the officer charged with the execution of the process either the amount or value of the goods claimed, the value to be fixed by appraisement in case of dispute, to be by the officer paid into Court to abide the decision of the judge upon the claim, and the sum which the officer shall be allowed to charge as costs for keeping possession of the goods until such decision can be obtained; and in default of the claimant so doing, the officer may sell the goods as if no such claim had been made, and shall pay into Court the proceeds of the sale, to abide the decision of the judge."

Judicature Act, 1873, s. 34.

And by the Judicature Act of 1873, s. 34, it is provided, that matters within the exclusive cognizance of the High Court of Admiralty, before the passing of that Act, are assigned to the Probate, Divorce, and Admiralty Division of the High Court of Justice.

CHAPTER VIII.

BY WHAT MEANS THE RIGHT OF DISTRESS MAY BE TAKEN AWAY.

So far, in our preceding chapters, we have considered the persons by whom, and the cases in which, a distress for rent can be made; and it seems to us advisable to shortly recapitulate the cases in which a distress for rent *cannot* be made.

Summary of instances when a distress for rent cannot be made.

Many of these we have discussed before; but perhaps it will not be inconvenient to call the reader's attention to them once again. In some cases, as in the instance of tender, the power to distrain simply for some particular amount is taken away; in others, the *existence* of the rent is altogether determined, and consequently all remedy by distress for its recovery lost.

Where no actual demise at a fixed rent.

Where, for example, there is no actual demise at a fixed rent (*a*), or where a sum is reserved, or issues out of personal property (*b*), or some incorporeal hereditament (*c*), the remedy by distress is not applicable.

So again, by the expiration of the term, whereby the privity of estate was absolutely destroyed, the rent itself, as well as the right to exercise that particular remedy, was entirely at an end. And although the statute 8 Anne, c. 14 (*d*), and 3 & 4 Will. IV. c. 42 (*e*), effected a remedy in this respect, still it must be observed that unless the remedy is exercised within the time laid down, and the

(*a*) *Ante*, p. 29.
(*b*) *Ante*, p. 3.
(*c*) *Ante*, p. 3.
(*d*) *Ante*, p. 185.
(*e*) *Ante*, pp. 58, 188.

circumstances therein expressed, the expiration of the tenancy will have barred the distress for ever. Or again, by the determination of the lessor's interest; by the extinction of the rent, whether in the case of a rent service (as by the tenant's eviction by title paramount from the land, or by the landlord's own act, as where he purchases the tenancy), or whether in the case of a rent-charge (as by the grantee purchasing or releasing all his rights in the land, or by releasing the rent itself), the right of distress is in all these cases illegal.

By determination of the lessor's interest.

So again, if the lessor parted with his reversion, the remedy of distress was destroyed at common law, and the powers of the statute 4 Geo. II. c. 28, were obliged to be resorted to before a distress for a rent-seck could be taken advantage of.

Where lessor parts with his reversion.

The merger of the reversion is also a means by which the right of distress is altogether taken away; but if the lease on which the rent is reserved was originally derived from an inheritance in fee, the extinction of a particular estate, subsequently created, would not affect the remedy against the lessee for the term (*f*); and the same principle would apply where a tenant for life granted a lease under a power in the deed creating his estate. For the estate of the lessee is in such a case derived out of the inheritance, and not out of the particular estate; and, therefore, on the extinguishment of the particular estate, the reversioner or remainderman has the same remedy by distress as the tenant for life had (*g*).

By a merger of the reversion.

And again, the right to distrain may be taken away by the non-performance of a condition which is precedent to the rent becoming payable (*h*).

By the non-performance of a condition precedent.

(*f*) *Threr* v. *Barton*, Moore, 94; *Smith* v. *Day*, 2 M. & W. 684; *Thorne* v. *Woollcombe*, 3 B. & Ad. 586.

(*g*) Bullen, 170.

(*h*) *Regnart* v. *Porter*, 7 Bing. 451; *Hopcraft* v. *Keys*, 9 Bing. 613; *Mechelan* v. *Wallace*, 7 Ad. & Ell. 54, n.

(a) By agreement not to distrain.

The right of distress for rent is not so inseparable an incident to a demise that it cannot be postponed, taken away, or suspended by an express or implied agreement between the parties not to distrain.

Therefore, where A., a mesne landlord, let premises to B., an undertenant, by a written agreement, which provided that no distress should be made till after A. had produced the receipt of his superior landlord for A.'s rent; and A. afterwards distrained for his rent without producing such receipt; it was held that A.'s right was *postponed* until after *his* rent had been paid (*i*).

So a landlord may for good consideration undertake not to distrain for six months (*k*). And where a tenant, who was in arrear with his landlord, was distrained upon, having previously executed a bill of sale of all his effects to a creditor, amongst which was a crop of growing grass not in the distress; and an arrangement was made by the landlord's agent and the creditor under this bill of sale that a sale should take place, and the arrears of rent be paid out of the proceeds; and the growing crop was sold with the rest as cutage, the proceeds of the sale being paid over to the landlord, but not satisfying the rent; it was held that from these facts a contract *might be implied* on the part of the landlord not to distrain the cattle of the purchaser of the grass; and, therefore, the distress by the landlord of his cattle, whilst eating the grass so purchased, was unlawful (*l*).

A superior landlord may undertake not to distrain on the goods of an intended lodger of his tenant (*m*). Where a landlord's receiver allowed a tenant every year for seventeen years to make a deduction in respect of a payment

(*i*) *Giles* v. *Spencer*, 3 C. B. N. S. 244; Vin. Abr. Releases, G.

(*k*) *Oxenham* v. *Collins*, 2 F. & F. 172.

(*l*) *Horsford* v. *Webster*, 1 Cr. M. & R. 696.

(*m*) *Horsford* v. *Webster*, *supra*. (Though, as we have seen, the Lodgers' Goods Protection Act renders such an undertaking now generally unnecessary. See *ante*, p. 156.)

Part I. Chap. VIII.

for land tax greater than the landlord was liable to pay, the landlord knowing, or having the means of knowing, all the facts; it was held that the latter could not afterwards distrain for the sums erroneously allowed, though the receipt given every year showed the amount really paid, and the amount deducted (*n*). In the same way, where double rent has accrued due on the tenant's holding over after notice under the 11 Geo. II. c. 19, it appears that the acceptance of single rent by the landlord would waive his right to distrain for more (*o*).

Acceptance of single instead of double rent.

Condition precedent.

But if the landlord's agreement to forego his remedy is dependent on the performance of a condition precedent by the other party, this condition must be strictly carried out in order to avoid the distress. Thus, in a case where the plaintiff being about to take an apartment of the defendant's tenant was promised by the defendant that his goods should not be taken so long as he paid the rent of the apartment to the tenant; and subsequently to his having paid part, and tendered the residue of the arrears, the defendant, who had no notice of the tender, distrained his goods for rent due from the tenant; it was held that the defendant's right to distrain was not barred (*p*).

(b) Effect of an agreement for interest on rent.

It must here be observed, that an agreement to take interest on rent in arrear does not take away the right of distress; for this is only an agreement for that which the law would have given to the landlord. There is no suspension of the distress, and the landlord at any time has a right to determine his forbearance and distrain for the rent (*q*).

(*n*) *Bramston* v. *Robins*, 4 Bing. 11, 12; *Waller* v. *Andrews*, 3 M. & W. 312. See also *Fowkes* v. *Joyce*, 2 Vern. 129; 2 Wms. Saund. 290, n. (7).

(*o*) *Doe* d. *Cheney* v. *Batten*, Cowp. 243; Bullen, 172.

(*p*) *Welsh* v. *Rose*, 6 Bing. 638; Bullen, 172.

(*q*) *Skerry* v. *Preston*, 2 Chit. Rep. 245.

(c) Effect of taking a security for the rent.

If the landlord takes a security for rent in arrear, as if he take a bond, bill of exchange, or promissory note, this will not of itself amount to a payment of the rent, nor suspend or take away his right to distrain. For rent is considered by the law to be a debt of a nature higher even than a demand upon a bond or other specialty; nor does the receipt of such note of itself suspend the right of distraining (*r*). Nor can a set-off, to an equal or greater amount of the rent in arrear, take away the right to distrain (*s*).

Rent of a higher nature than a specialty debt.

Set-off.

Promissory note.

If a tenant, on whom his landlord has distrained for rent, gives a promissory note for the amount jointly with another person to release his goods, and a subsequent distress is made on him for arrears of rent accruing due after the period to which the note referred, the produce of the sale of such latter distress must be applied in discharge of the note. The landlord cannot apply it in discharge of the subsequent rent, and then sue the person who joined in giving the note for the former rent (*t*). But payment of the bond, bill, or note would be an extinguishment of it; or even a judgment obtained upon a bond (*u*); although the landlord's right to distrain revives upon an execution being waived (*x*). In a case where a tenant being indebted to his landlord for rent, the landlord's agent without his authority took a bill of exchange from the tenant and paid over the amount of the rent to the landlord in his settlement of account, and the bill was dishonoured in the hands of a third party, and the rent not paid by the tenant; it was held that it was a question for the jury

Revival of right to distrain.

Bill of exchange.

(*r*) *Davies* v. *Gyde*, 2 A. & E. 623; *Murray* v. *King*, 5 B. & A. 165; *Harris* v. *Shipway* and *Ewer* v. *Lady Clifton*, Bull. N. P. 182; *Seven* v. *Mihill*, 1 Lord Ken. 370.

(*s*) *Absalam* v. *King*, Bull. N. P. 181; *Laycock* v. *Tufnell*, 2 Chit. Rep. 531; *Andrew* v. *Hancock*, 1 Brod. & B. 46; *Stubbs* v. *Parsons*, 3 B. & A. 521; *Wilson* v. *Davenport*, 5 C. & P. 531.

(*t*) *Palfrey* v. *Baker*, 3 Price, 572.

(*u*) *Harris* v. *Shipway*, *Ewer* v. *Lady Clifton*, *supra*.

(*x*) *Seven* v. *Mihill*, *supra*.

Part I. Chap. VIII.

whether such bill was discounted for, or the money lent to the tenant by, the agent, or whether it was an advance by the agent to the landlord; in which latter case he was entitled to distrain; and that if the bill was discounted for, or the money so lent to, the tenant, the landlord was not entitled to distrain—otherwise he was (*y*). And where to an action of covenant for rent against three defendants it was pleaded that 41*l.* of the rent was paid; that of the residue, two of the defendants had paid their shares, and that the other had given the plaintiff a promissory note for his share payable at a banker's; that such note was dishonoured, whereupon the plaintiff sued him, and had judgment by default on the note, which judgment was still unsatisfied; it was held that the judgment was no merger, being obtained on a collateral security, and not having produced actual satisfaction (*z*).

A right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under the Mercantile Law Amendment Act, 1856 (*a*), s. 5. Such a right cannot be considered as a security held for a debt; it is a particular remedy which arises on non-payment, and the above section appears to be dealing with securities which are in their nature assignable. And this is not the case with the power of distress for rent, which, according to the common law, was only incidental to the immediate reversion (*b*).

(d) Second distress; (1) in case of insufficiency.

There is another general rule which limits the right of a landlord to distrain; namely, that the whole amount of rent in arrear must be distrained for at once, if sufficient goods can be found upon the premises, or if the distress has not been voluntarily abandoned (*c*); and that after a distress

(*y*) *Parrott* v. *Anderson*, 7 Ex. 93; *Griffiths* v. *Chichester*, 7 Ex. 95, note (*a*).

(*z*) *Drake* v. *Mitchell*, 3 East, 251.

(*a*) 19 & 20 Vict. c. 97.

(*b*) *Russell* v. *Shoolbred*, 29 Ch. Div. 254.

(*c*) *Dawson* v. *Cropp*, 1 C.B. 961. For form of statement of claim for distraining twice for the same rent, see App. A. (21).

for rent has once been made, *no second distress* will be valid for the same rent.

17 Car. 2, c. 7, s. 4.

By the old statute of 17 Car. II. c. 7, s. 4 (which was passed to protect landlords in cases where, after a distress had been replevied, the tenant had been nonsuited, or had judgment given against him, by simplifying the mode of proceeding in such cases in manner there pointed out), an express provision was given to landlords "in all cases where the value of the cattle distrained should not be found to be of the full value of the arrears distrained, the party to whom such arrears were due, his executors or administrators, might from time to time distrain again for the residue of the said arrears" (*d*).

An entire demand cannot be divided.

A person entitled to distrain for an entire demand cannot split it. So where a landlord entitled to a rent-charge distrained in another part of the land out of which the rent issued for half-a-year's payment, having previously distrained the same sum upon the other part; it was held that the grantee of the rent-charge could not divide the demand, and distrain for part on one part of the land, and afterwards for the residue on the other (*e*).

A man is not entitled to distrain at different times for rent due on the same day. But if rent becomes due at different times he may distrain separately (*f*), provided the arrears be several and distinct (*g*).

A second distress cannot be justified where there is enough which might have been taken upon the first distress, if the distrainor had then thought proper; for he

(*d*) This statute seems, however, to have been repealed by the Statute Law Revision Act, 1881, and nothing appears to have been substituted for it.

(*e*) *Owens* v. *Wynne*, 4 El. & Bl. 579; *Wallis* v. *Saville*, 2 Lutw. 1532; *Hutchins* v. *Chambers*, 1 Burr. 589; 1 Wms. Saund. 201, n. 1.

(*f*) *Gambrell* v. *Earl of Falmouth*, 4 Ad. & Ell. 73; *Lear* v. *Caldecott*, 4 Q. B. 123; *White* v. *Greenish*, 11 C. B. N. S. 209.

(*g*) Bullen, 109.

Part I. Chap. VIII.

Bagge v. *Mawby.*

ought to have taken sufficient at first. This principle is illustrated in the case of *Bagge*, app. v. *Mawby*, resp. (*h*), where half-a-year's rent being due from a tenant who had committed an act of bankruptcy, his landlord put in a distress, and was about to sell, but in consequence of a notice from the petitioning creditor, stating that he was proceeding against the tenant in bankruptcy, requiring the auctioneer not to sell, and threatening to hold him accountable if he did, the landlord withdrew the distress without obtaining payment, and at that time no adjudication of bankruptcy had been made, nor any assignee appointed; it was held that the landlord was not justified in afterwards distraining a second time on the same goods to satisfy his claim for the same arrears of rent (*i*). And, therefore, an action would lie against the landlord for the goods taken on a second distress, where he might have taken sufficient on the first, or where he had voluntarily abandoned it (*k*).

Abandonment of first distress.

So where a defendant levied a distress for rent, neglecting to pay himself out of the said distress, and afterwards seized the same goods under a second distress, having abandoned the former one under the pretext that it was insufficient to satisfy the rent; it was held that a landlord cannot make two distresses for the same rent, if the first was sufficient (*l*). And where a tender has been made, after a distress, to the landlord sufficient to cover the rent and expenses, and the landlord subsequently enters and distrains again, the tenant may have an action against him for so doing (*m*).

Mistake in the value of the goods.

If a man, however, seize for the whole sum that is due to him, and makes a mistake in the value of the goods seized, which may be of an uncertain or imaginary value,

(*h*) 8 Exch. 641.
(*i*) *Bagge* v. *Mawby*, *supra*.
(*k*) *Smith* v. *Goodwin*, 4 B. & Ad. 413; *Dawson* v. *Cropp*, 1 C. B. 961; *Lear* v. *Caldecott*, 4 Q. B. 123; *Piggott* v. *Bertles*, 1 M. & W. 441.
(*l*) *Dawson* v. *Cropp*, *supra*.
(*m*) *Smith* v. *Goodwin*, *supra*.

there is no reason why he should not afterwards complete his taking by making a further seizure. So where there were two distresses under the same warrant for poor rates, and upon the first distress beasts of the plough were taken, and this proving insufficient a second distress was made, which was excessive in the amount of the goods taken, and in it were also included beasts of the plough; it was held that a man who makes a distress, and *mistakes as to the value of the goods seized*, may afterwards, on discovering the mistake, make a second seizure; and that a general action of trespass cannot be maintained against him for taking an excessive distress (*n*).

But if there is a fair opportunity, and no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first distress, and he cannot distrain again (*o*).

Withdrawal of the distress.

If the landlord withdraws the distress at the tenant's request and for his accommodation (*p*), or is induced to withdraw it by the tenant's assurance (which is false and fraudulently made) that a particular debt has been satisfied, and the tenant's goods are seized by the sheriff, in such a case the landlord has a right to have paid to him a year's rent by the sheriff under the statute 8 Anne, c. 14, in spite of such withdrawal (*q*).

Reason of the rule.

The principle upon which, as a general rule, the landlord cannot distrain twice is, that he must not vex his tenant by the exercise upon two occasions of this summary remedy of distress. But where a bean stack of the plaintiff's was being distrained for rates due from the defendants, and it was afterwards sold by auction, and a valid contract of sale effected, and on the purchaser subsequently proceeding to remove it, he was forcibly prevented by the

(*n*) *Hutchins* v. *Chambers*, 1 Burr. 579; 1 Wms. Saund. 201, note 1.

(*o*) Per Parke, B., in *Bagge* v. *Mawby*, *supra*.

(*p*) For Form of Request, see App. A. (7).

(*q*) *Woollaston* v. *Stafford*, 15 C. B. 278.

plaintiff, and never afterwards had an opportunity of taking it away; and the purchaser not having paid for the stack, a second distress was made for the rates and other things distrained under it; it was held that such second distress was lawful, as the tenant *by his misconduct* prevented the realisation of the first distress (*r*).

The re-entry in such cases does not amount to a second distress; it is merely a continuance of the original taking, and should be confined to the goods previously taken, and not extend to any others (*s*).

(2) Second distress in case of replevin.

Although, as we have seen, a previous distress may have the effect of making the distrainor liable for the second taking, it seems that whilst the rent really continues in arrear and unsatisfied the tenant cannot successfully *replevy* the second distress, or plead the first seizure in bar to an avowry of rent (*t*). So where, to a cognizance for rent in arrear, there was a plea in bar that the defendant on a former occasion made a distress for the same rent, and took goods liable to distress sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do, and wrongfully made a second distress for the same rent; this was held bad, as the plea did not show that the rent was satisfied by the former distress (*u*). And, again, where to an avowry by executors for rent due in their testator's lifetime, there was a plea that the testator took as a distress for the same rent goods of sufficient value to satisfy such rent and the costs of taking the distress; it was held insufficient, as it should have shown that such distress produced a satisfaction of the rent (*x*).

(*r*) *Lee* v. *Cooke*, 2 H. & N. 584; 3 *Id.* 203.

(*s*) *Smith* v. *Torr*, 3 F. & F. 505.

(*t*) Bullen, 173.

(*u*) *Hudd* v. *Ravenor*, 2 Brod. & B. 662; *Dawson* v. *Cropp*, *supra*.

(*x*) *Lingham* v. *Warren*, 2 Brod. & B. 36. See also *Lear* v. *Edmonds*, 1 B. & Ald. 157; and *Lees* v. *Wright*, 1 D. & Ryl. 391; Bullen, 174; Woodfall, L. & T. 12th ed. 451.

The two sureties in a replevin bond are together liable only for the amount of the penalty in the bond and the costs of the suit on the bond. If the plaintiff in replevin is nonsuited, the defendant may again distrain the same goods for rent subsequently accrued previously to executing his "*retorno habendo*" (*y*), without waiving his action against the sureties on the bond (*z*).

Second distress of the same goods.

A second distress of the same goods for the same rent, after they have been replevied and returned to the owner by the sheriff, and whilst the action of replevin is pending, is not only illegal but a contempt of the law; for by the second distress the distrainor takes upon himself to determine the legality of the first, whilst that very point is under the consideration of the Court (*a*).

(e) Payment of the rent in arrear.

It is unnecessary to mention again the cases in which the landlord's right of distress is taken away by payment of the rent in arrear. For these we will refer our readers to previous pages (*b*).

(f) Tender of the rent in arrear.

We have now to consider a question which is of some importance, namely, the effect of a *tender* of rent.

A distress cannot be made lawfully when the tenant has tendered the full amount of rent to his landlord, or to an agent duly authorized by him to receive such rent (*c*). And tender of rent, *even without expenses*, to a duly-authorized agent *before* seizure is a good tender. So where the plaintiff was tenant of a dwelling-house, the rent of which was received by the defendants for the landlord, and the rent being in arrear, the defendants seized as agents to the landlord, and delivered to the broker a warrant of distress; but before it was executed the plaintiff tendered to the defendants the amount of the rent, which they

Tender without expenses.

(*y*) See *post*, p. 367.

(*z*) *Heffordv.Alger*, 1 Taunt. 218.

(*a*) Gilbert's Replevin, by Impey, 224; Bullen, 174.

(*b*) *Ante*, pp. 174 *et seq.*

(*c*) *Branscombe* v. *Bridges*, 1 B. & C. 145; *Smith* v. *Goodwin*, 4 B. & Ad. 413.

refused to receive on the ground that the distress warrant had issued; and subsequently the plaintiff tendered the amount to the broker, who also refused to receive it *unless certain alleged costs were paid*, and the broker afterwards distrained on the plaintiff's goods; it was held that the distress was illegal, and that the defendants were not mere agents to convey an authority from the landlord, but were persons committing the wrongful act, and therefore liable in trespass for the damage sustained by the plaintiff (*d*).

Authority of bailiff to receive rent.

When a bailiff has received his authority from the landlord, he is thereby in effect authorized to receive the rent; and such authority cannot be limited by express instructions given to him by the landlord not to receive such rent; as where a landlord gave instructions to his bailiff to refer the tenant to his attorney (*e*).

So that, although the landlord refuses to take the rent, a tender of it at the proper time and place will prevent a distress, as that is all that the tenant is bound to do (*f*).

To whom tender may be made: To the landlord.

The tender may be made to the landlord himself. It need not be to the broker or bailiff who distrains; and this notwithstanding that he has instructed a broker to distrain, and left the matter in his hands (*g*). If the latter detains the distress after tender made to the landlord, he

To his agent.

will be guilty of a wrongful act. A tender to the landlord's agent who signed the distress warrant on his behalf, or to any agent who has express or implied authority to

But not to a man merely left in possession.

receive the rent, is sufficient (*h*); but a tender to the broker's man *who is merely left in possession*, and neither has authority to receive the money, nor holds the warrant, is bad (*i*).

(*d*) *Bennett* v. *Bayes*, 5 H. & N. 391; Bro. Distress, 37; *Six Carpenters' case*, 1 Sm. L. C. 8th ed. 147; *Holland* v. *Bird*, 10 Bing. 15.

(*e*) *Hatch* v. *Hale*, 15 Q. B. 10.

(*f*) Bullen, 176.

(*g*) *Smith* v. *Goodwin*, 4 B. & A. 413; *Moffatt* v. *Parsons*, 5 Taunt. 307.

(*h*) *Bennett* v. *Bayes*, *supra*.

(*i*) *Branscombe* v. *Bridges*, 1 B. & C. 145; *Boulton* v. *Reynolds*, 2 El. & E. 369.

There are some cases in which a tender to the bailiff distraining may be insufficient; for a person may have been authorized to distrain who could not be trusted to receive the rent and costs. So, as we have seen, a tender to a mere man in possession is insufficient, as also to a mere servant (*k*). But where an agency for such purposes can be proved to exist, as where it appeared that the distrainor's wife had been in the habit of acting as his agent in such matters, and had in his absence made a distress for damage feasant, a tender to such a person is valid (*l*).

To a servant.

The common law rules as to the rights of landlord and tenant in these cases are laid down by Lord Coke in the *Six Carpenters' Case* (*m*), where he says, "Tender upon the land (*n*) *before* the distress (*o*) makes the distress tortious; tender *after* the distress, and *before impounding* makes the *detainer*, and not the taking, wrongful; tender after (*p*) the impounding makes neither the one nor the other wrongful: for then it comes too late, because the cause is put to the trial of the law, to be there determined."

Six Carpenters' Case.

So where a tender of rent and costs was made after the distress, but before the goods were impounded or removed, and the landlord refused to accept such tender, and afterwards removed the goods; it was held that he was liable to the tenant in trespass for such removal (*q*).

Tender before impounding.

But, as we have seen, a tender of the rent with expenses after the impounding is too late to enable the tenant to maintain an action of trespass, trover, detinue, or replevin; because the goods are then in the custody of the law, and not of the landlord or his agent (*r*).

Tender after impounding.

(*k*) *Pilkington* v. *Hastings*, Cro. Eliz. 813.
(*l*) *Brown* v. *Powell*, 4 Bing. 230.
(*m*) 8 Rep. 146.
(*n*) 2 Sid. 40.
(*o*) 5 Co. 76 a; 2 Inst. 107.
(*p*) 2 Rolle, 561; 1 Brownl. 173; 2 Inst. 107; 5 Co. 76 a.
(*q*) *Vertue* v. *Beasley*, 1 Moo. & R. 21; *Evans* v. *Elliott*, 5 Ad. & Ell. 142; *Loring* v. *Warburton*, Ell. B. & Ell. 507.
(*r*) *Six Carpenters' Case*, 1

Part I. Chap. VIII.

But it has now been decided that an action is maintainable upon the equity of the statute 2 Will. & Mary, sess. 1, c. 5, s. 2 (which enables distresses for rent to be sold after five days), for selling goods seized under a distress for rent, where a tender of rent and expenses has been made before the sale, and within five days of the seizure, although after impounding (*s*).

It will therefore be seen that in such a case the landlord should, after a tender, abstain from selling, and merely keep the distress impounded as a pledge until the arrears of rent are paid, or the tenant replevies (*t*).

As to what is an impounding.

It will be seen that the question of what is sufficient to amount to an impounding becomes of great importance: and for this we must refer our readers to a previous chapter (*u*).

Where a landlord after a lawful distress and impounding accepts the rent in arrear and costs of distress, he is not liable as a trespasser *merely because he retains possession* of the goods distrained (*x*).

A tender of rent upon the land must be made a convenient time before sunset (*y*).

The tender must be of the full amount of rent, without any deductions, except in certain cases which we have already mentioned (*z*).

It should also be made unconditionally.

A tender of a quarter's rent with a demand of a receipt to a particular day, the contest between the parties being whether one or two quarters' rent was due, is not a valid

Sm. L. C. 8th ed. p. 147; *Firth* v. *Purvis*, 5 T. R. 432; *Thomas* v. *Harris*, Man. & G. 695; *Ladd* v. *Thomas*, 12 Ad. & Ell. 117; *Tennant* v. *Field*, 8 El. & Bl. 336.

(*s*) *Johnson* v. *Upham*, 2 E. & E. 250; overruling *Ellis* v. *Taylor*, 8 M. & W. 415.

(*t*) Woodfall's L. & T. 12th ed. 386.

(*u*) *Ante*, Chapter VI.

(*x*) *West* v. *Nibbs*, 4 C. B. 172.

(*y*) *Keating* v. *Irish*, Lutw. 229.

(*z*) *Ante*, p. 174.

tender (*a*). But sending a certain sum "to settle one year's rent" does not impose a condition (*b*); nor does a tender under protest (*c*).

(g) Restraining a distress by injunction. Judicature Act, 1875, s. 25, sub-s. 8.

A distress may now be restrained by injunction. This was not so before the Judicature Acts (*d*); but by sect. 25, sub-sect. 8 of the Judicature Act, 1875, "an injunction may be granted by an interlocutory order of the Court in all cases where it shall appear to the Court to be just or convenient." In the case of *Shaw* v. *Earl of Jersey* (*e*), the plaintiffs were assignees of a mining lease, under which the defendant claimed to be entitled to an additional rent. The defendant distrained twice, and the plaintiffs sued for an unlawful distress. A special case was stated to determine the construction of the lease; and the defendant was restrained by injunction from distraining until the determination of the case. But the Court will not grant an injunction to restrain a landlord from distraining for rent, even though it is doubtful whether he is entitled to such rent, without providing for the landlord having the amount of such rent secured to him, in the event of his ultimately being found to be entitled to it (*f*).

In the case of *Carter* v. *Salmon* (*g*), A. agreed in writing to let a farm to B. The agreement reserved a rent payable at stated intervals, and provided that A. should put the premises in repair. B. alleged that prior to the agreement being signed, A. promised verbally that if B. would take the farm the buildings should be put into a thorough state of repair, and that no rent should be demanded till this was done, and that on the faith of this promise B.

(*a*) *Finch* v. *Miller*, 5 C. B. 428.

(*b*) *Brown* v. *Owen*, 11 Q.B. 130; *Bull* v. *Parker*, 2 Dowl. N. S. 345.

(*c*) *Manning* v. *Lunn*, 2 C. & K. 13; Woodfall's L. & T. 12th ed. 388.

(*d*) *Best* v. *Drake*, 11 Hare, 369.

(*e*) L. R. 4 C. P. D. 129, 359.

(*f*) *Shaw* v. *The Earl of Jersey*, *supra*.

(*g*) 43 L. T. N. S. 490.

took the farm. A. afterwards mortgaged the premises to C., who gave B. notice of the mortgage, and that the principal and interest were in arrear, and directed him to pay the rent to C. B. then set up the alleged collateral agreement of which C. was previously unaware. C. after notice distrained for the rent reserved by the unwritten agreement, and due before and after the date of his mortgage. In an action by B. against C. for an injunction to restrain him from holding or selling the goods, and for damages for improperly distraining, and against A. and C. for specific performance of the written agreement, and the alleged parol agreement, Malins, V.-C., on the motion of the plaintiff, and subject to certain terms, granted an interlocutory injunction restraining C. from remaining in possession, and from selling for a certain time. It was held that the injunction ought not to have been granted. For assuming that the parol agreement existed, the mortgagee of the reversion without notice was not bound by it. Semble, that a Court of equity will not interfere with the legal right of distraint by the owner of the reversion for the rent due to him on the contract of tenancy, even where the distraint is for more money than is due as rent.

Where a mortgagee appointed a receiver of the income of the mortgaged property under the Conveyancing Act, 1881, and gave notice of the appointment to the mortgagor; and the mortgagor nevertheless distrained for rent becoming due after the appointment of the receiver, on the ground that he distrained for the protection of the property, and alleging that the receiver had been negligent in collecting the rent; it was held that an injunction must be granted to restrain the mortgagor from interfering with the receiver for receiving the rent. Even if the mortgagor had proved negligence on the part of the receiver, it is questionable whether distraining for the rent was the proper mode of protecting his interests (*h*).

(*h*) *Bayly* v. *Went*, 51 L. T. N. S. 764.

CHAPTER IX.

OF A DISTRESS OF THINGS DAMAGE FEASANT.

Hitherto we have treated exclusively of the rights enjoyed by a landlord to distrain for arrears of rent, and it will now be necessary to consider a branch of this subject which is almost as important, namely, the right of distraining things damage feasant.

Definition of damage feasant.

This has been defined as "a remedy by which if cattle or other things are on a man's land encumbering it, or otherwise doing damage there, he may summarily seize them without legal process, and retain them impounded as a pledge for the redress of the injury he has sustained" (*a*). It has also been said to be "a remedy applicable wherever anything animate or inanimate is upon land *doing damage thereto*, or to its produce, and it is available for any person who is aggrieved by such damage" (*b*).

Applies to inanimate things.

With regard to inanimate things, it has been held in a case decided on the Railways Clauses Act, 1845 (*c*) (which provides that no one shall use an engine on the rail of a company which has not been approved of by the company, and that a certificate of the approval may be obtained by certain steps; and that if an engine be used on the railway without a certificate the party using shall forfeit to the company a sum not exceeding 20*l.*, and the company may remove the engine), that a company has a common law right of distress damage feasant on an engine *encumbering the railway*, if there is no certificate of approval (*d*).

(*a*) Fleta, 101, s. 25; 51 Hen. III. st. 4; Bullen, 227.

(*b*) Bullen, 227.

(*c*) 8 & 9 Vict. c. 20, ss. 115, 116.

(*d*) *Ambergate Rail. Co.* v. *Midland Rail. Co.*, 2 El. & Bl. 793.

Part I. Chap. IX.

Distinction between distress for rent and for damage feasant.

There is an important distinction between a distress for rent and a distress damage feasant; for in the former case a man may distrain any cattle which he finds upon the premises, but in the latter they must be *actually doing damage*. Another distinction is that, in the case of damage feasant, the party aggrieved, or his agent, may distrain in the *night-time*, for "otherwise it may be the beasts will be gone before he can take them" (*e*).

Who may distrain.

The owner of the soil, although he has no interest in pasture or herbage, may distrain cattle damage feasant in respect of injuries committed by their destroying plants or trees in which his interest still continues (*f*).

But the remedy is not confined to the mere owner of the soil upon which the beasts may be found: it extends to all persons who are entitled to the use or produce of the land, and may therefore receive injury from the damage. So where A. demised to B. the milk of twenty-two cows to be provided by A., and to be fed at A.'s expense on certain closes belonging to A., and A. covenanted that B. might turn out a mare, and that no other cattle should be fed there; it was held that the separate herbage and feeding of those closes passed to B., and that B. might distrain other cattle of A. doing damage there (*g*). So also commoners, who are entitled to the use and produce of the land, may distrain damage feasant whenever their rights are injured (*h*), and whenever cattle are put upon the common without any colour of right. This is well illustrated in the case of *Hall* v. *Harding* (*i*), in which case it is laid down that whenever there is a colour of right for putting in the cattle, a commoner cannot distrain; because it would be judging for himself in a question that depends upon a more competent inquiry. But where cattle are put

Commoners.

Hall v. *Harding*.

(*e*) Co. Litt. 142a.

(*f*) *Hoskins* v. *Robins*, 2 Saund. 328.

(*g*) *Burt* v. *Moore*, 5 T. R. 329.

(*h*) 1 Roll. Abr. 405; *Mary's Case*, 9 Co. Rep. 112b; Bullen, 228.

(*i*) 4 Burr. 2432.

on the common without any colour or pretence of right, the commoner may distrain for them, and therefore he may distrain the cattle of a stranger. And a claim of a custom from time immemorial that cattle upon adjoining commons strayed from one to the other, is a sufficient colour of right to deprive a commoner of one common of the remedy of distress against trespassing cattle of a commoner of the adjoining common, even although the latter has surcharged his own common (*k*).

"Colour of right."

We have already referred to the cases in which one commoner has the right of distraining upon beasts found upon a common (*l*). A commoner can, however, rarely distrain the cattle of his lord, except by special custom (*m*).

If cattle are agisted by the lord, and improperly put upon the common, the commoners may distrain them as the cattle of a stranger (*n*). But they cannot do so where the lord has any pretence of right for putting on his own cattle, and the number which he has to put on is not absolutely stinted, although he may have been guilty of a surcharge (*o*).

Agistment of cattle by the lord.

If the right of common be for cattle levant and couchant upon the owner's land, another commoner cannot distrain for surcharge, but must try by a jury the number accommodated to the land (*p*).

A right of distress may be given, it seems, by agreement between commoners by which they agree to restrain the exercise of their privileges to certain specified portions of the common field, or for a certain time; for the commoner who enters into such an agreement renders himself a

Right of distress may be given by agreement between commoners.

(*k*) *Cape* v. *Scott*, L. R. 9 Q. B. 269. See also *Dixon* v. *James*, 2 Lutw. 1238.

(*l*) See *ante*, p. 64.

(*m*) *Kinrick* v. *Pargiter*, Yelv. 129; 1 Roll. Abr. 405, 406; *Burt* v. *Moore*, 5 T. R. 335; Bullen, 228, 229.

(*n*) 30 Edw. III. c. 27.

(*o*) *Hodesdon* v. *Gresil*, Yelv. 104; Bullen, 229; *Hall* v. *Harding*, 4 Burr. 2431.

(*p*) Bl. Rep. 674; Bullen, 229. See also *Dixon* v. *James*, 2 Lutw. 1241; *Ellis* v. *Rowles*, Willes, 638.

Part I. Chap. IX.

stranger to the land, and his cattle, if found there, may be distrained (*q*); but the cattle must actually be upon the distrainor's parcel (*r*).

Concurrent possession of land to take profits of a special nature.

If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other. But if two persons have the concurrent possession of land, for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other (as where A., having the exclusive right of digging stones, distrained the cattle of B., who had the exclusive right of depasturing his cattle there, as damage feasant for having broken the stones), it is doubtful whether either party is bound to guard against casual damage which during, and by the fair enjoyment of, his right may happen to the other; but clearly the one cannot distrain the cattle of the other damage feasant, the remedy, if any, being by action, not distress (*s*).

So also, turves laid on a common (*t*), or tithes set out and not removed (*u*), may be distrained damage feasant. If cattle be put into a man's pasture for a week, and he afterwards give the owner of them notice that he will keep them no longer, if they are not removed, he may distrain them as damage feasant (*x*).

A tenant holding over after the expiration of his term cannot lawfully distrain the landlord's cattle put upon the premises by way of taking possession (*y*).

Cattle carried to a public fair.

Every person has of common right a liberty of carrying his goods to a public fair for sale, and consequently such goods whilst at the fair cannot be distrained damage

(*q*) *Whiteman* v. *King*, 2 H. Bl. 4.

(*r*) 1 Roll. Abr. 665.

(*s*) *Churchill* v. *Evans*, 1 Taunt. 529.

(*t*) *Brownhall* v. *Norton*, Sir T. Jones, 193.

(*u*) *Baker* v. *Leathes*, Wightwick, 113.

(*x*) Noy's Maxims, 33; Bullen, 231.

(*y*) *Taunton* v. *Coster*, 7 T. R. 431; *Butcher* v. *Butcher*, 7 B. & C. 399.

feasant by the owner of the soil and fair (*z*); neither can the distress be taken on the highway (*a*).

By whom a distress damage feasant may be made or authorized.

The right of making or authorizing a distress damage feasant seems to depend upon the possession of the land on which the injury is done. So, if a distress damage feasant be made in respect of a right of common of pasture, to which two tenants in common are entitled, the distress should be joint; for it is made in respect of their joint possession, and not of their several estates (*b*).

And where it is made in respect of their several estates, as for damage feasant on land to which two tenants in common are entitled, although neither of them may distrain alone, yet he must avow in his own name and make cognizance as bailiff of his co-tenant (*c*).

No importance attached to the fact of ownership.

In the case of damage feasant no importance is to be attached to the fact of ownership with regard to the things doing the damage. The law recognizes no exemption with regard to the ownership or nature of the things distrainable; so, that if cattle be trespassers upon the land, they may be distrained damage feasant, although they came on to the land without their owner's knowledge or consent, or by the default of another (*d*). So, also, as a distress damage feasant is made for the injury sustained by reason of the very thing distrained, it necessarily follows that no kind of thing which can be taken damage feasant can be exempted from distress, with one exception, of which we have spoken above, namely, things in actual use, as a horse on which a man is riding (*e*). The reason for this we have given before, namely, that an attempt to distrain

No exemption from distress except in things in actual use.

(*z*) *Austin* v. *Whittred*, Willes, 623; *Launceston's case*, Cro. Eliz. 75; *Leadenhall Market*, 2 Ld. Raym. 1589.

(*a*) 52 Hen. III. c. 15; *Lyons* v. *Martin*, 8 A. & E. 513.

(*b*) *Culley* v. *Spearman*, 2 H. Bl. 386.

(*c*) *Willis* v. *Fletcher*, Cro. Eliz. 530; Bradby, 138. For Forms of Avowry in damage feasant, see App. B. (29) & (30).

(*d*) 1 Roll. Abr. 665.

(*e*) *Hoskins* v. *Robins*, 2 Saund. 328; *Storey* v. *Robinson*, 6 T. R. 138; 9 Vin. Abr. 121, Distress A. pl. 4.

Part I. Chap. IX.

things under such circumstances would probably lead to a breach of the peace (*f*).

To what this exemption extends.

This exemption extends not only to the horse on which a man is riding, but also to the harness and the other things which are in actual manual use. In such a case it is not necessary for the person whose property is distrained to aver that "the peace was endangered," nor that the things taken were "in manual use." It is sufficient to state that they were "in the actual possession of the plaintiff, and then under his personal care, and were then being actually used by him" (*g*).

So if ferrets and nets in a warren be damage feasant, a distress on them is good; but if they are in the hands of a man they cannot be distrained (*h*). Again, it is said in another case that "if men are rowing upon my water and endeavouring with their nets to catch fish in my several piscary, I may take their oars and nets and detain them as damage feasant to stop their further fishing, though it seems I may not cut their nets" (*i*). But where a dog was distrained damage feasant in a close, and it appeared that the dog when taken was in the actual possession of the plaintiff's son and his servant, and then under the personal care, and being used by the servant; it was held that this was insufficient as applied to a dog to show such use of it as exempted it from seizure, Patteson, J., saying "that it would have been sufficient if the dog had been proved to be within sound of the servant's whistle when it was taken" (*k*).

Cattle trespassing by owner's negligence.

Where beasts escape and come upon land by the negligence or fault of their owner, and are trespassers there,

(*f*) *Ante*, p. 139.

(*g*) *Field* v. *Adames*, 12 Ad. & Ell. 649. But see *Wagstaff* v. *Clark*, Camb. Summ. Ass. 1826.

(*h*) Hargreaves' Co. Litt. 47.

(*i*) *Reynell* v. *Campernoon*, Cro. Car. 228.

(*k*) *Bunch* v. *Kennington*, 1 Q. B. 679.

they may be distrained immediately by the landlord for rent in arrear (*l*). But where the cattle of a stranger stray into the land without their owner's knowledge or default through defective or insufficient fences, which the tenant or his landlord ought to repair, they cannot be distrained by the lessor for rent reserved, until they have been *levant and couchant* on the land; that is, they must be "lying down and rising up on the premises for a night and a day without pursuit made by the owner of them," and until *actual notice* has been given to the owner, and he has refused or neglected to drive them away (*m*). This privilege seems to be given because it is the fault of the lessor that the damage has happened, for if the land were in his own possession he should have kept the fences in repair, and if they were in the possession of a lessee he should have obliged him to repair by covenant (*n*).

Defect of fences.

Cattle levant and couchant.

Where cattle passing along a public highway stray into an adjoining field through defective fences, the owner of the cattle is bound to remove them within a reasonable time, until the expiration of which they cannot lawfully be distrained damage feasant. So where cattle of the plaintiff were being driven along a road in the dark, and some of them strayed into the defendant's field through a gap in the fence, and the driver went on with the rest and put them into a place of safety, and then returned to take those which had strayed (but which the defendant had by that time distrained), the defendant in an action of trespass for the taking pleaded that he had distrained the cattle damage feasant, and that he had not distrained until a reasonable time had elapsed to remove them; it was held that a "reasonable time" meant not merely a reasonable time for the act of removal, but what was

Obligation of owner to remove straying cattle.

Time when cattle should be removed.

(*l*) Gilbert on Distress, 45; Co. Litt. 47a, n. 301; *Kemp* v. *Crawes*, 2 Lutw. 1573.

(*m*) Bullen, 103; *Poole* v. *Longueville*, 2 Saund. 289.

(*n*) *Kemp* v. *Crawes*, 2 Lutw. 1573.

reasonable under all the circumstances of the case, and that this was for the jury to determine (*o*).

Obligation of owner to keep fences in repair.

Where a plaintiff occupied land adjoining a river, and on the other side the defendant occupied land which he was bound to fence, but from his neglect to fence it the plaintiff's cattle escaped into the defendant's close, and afterwards from that close *over a good and substantial fence* into an adjoining corn field of the defendant; and the defendant distrained the plaintiff's cattle in the corn field as damage feasant: it was held, that the cattle having first escaped in consequence of the defendant's neglect to fence the first field, he could not distrain the cattle when they escaped over the sound fence into the corn field; Pollock, C. B., remarking, "When any wrong is done, or damage sustained, the law inquires—when was the first wrong done? Who was the cause of first setting it in motion? Or what was the origin of the mischief?" and Bramwell, B., observing, "It is conceded that, according to the authorities, if the plaintiff's cattle being by the defendant's default in his land had escaped therefrom into the close of a third party, and had there sustained an injury, the plaintiff could maintain an action against the defendant for damages in consequence of the injury, and on that ground, to avoid circuity of action, the defendant should not be at liberty to impound the plaintiff's cattle damage feasant, and then leave the plaintiff to a cross action against him for the injury sustained by the impounding. No man should complain of another's act, when it is the immediate result of his own negligence" (*p*).

But where the plaintiff was the occupier of a field which was separated from the defendant's field by a hedge, and for the last fifty years the defendant's predecessors had repaired this hedge, and in consequence of the fence being out of repair the plaintiff's cattle strayed into the defen-

(*o*) *Goodwin* v. *Cheveley*, 4 H. & N. 631.

(*p*) *Singleton* v. *Williamson*, 7 H. & N. 410.

dant's field, who seized them as a distress damage feasant; it was held, that there was no liability on the part of the defendant to repair the fence, and, therefore, he was empowered to distrain damage feasant (*q*). For a man is only bound to take care that his cattle do not wander from his own land and trespass on the land of others. He is under no legal obligation to keep up fences between adjoining closes of which he is owner (*r*). In order to justify the distraining of an animal damage feasant, the animal must be actually doing the damage at the time. In fact, it must be taken in the act; or, having done some damage, it must be necessary to detain it in order to prevent its doing further damage.

The animal must be doing actual damage at the time.

So that if the owner of the freehold seizes an animal, which has done damage to the freehold, but which has ceased doing so, and it is not necessary to detain the animal to prevent further damage, and the owner of the freehold detains the animal and feeds it for several days, and then sells it for its value, the owner of the animal is entitled to recover the full value of the animal, without any deduction for the feeding, as the owner of the freehold seized the animal in his own wrong (*s*). So, also, beasts can only be distrained for the damage done at the one time when they are distrained; so that if they trespass on the land one day, and then go off without being seized, and trespass on it again the next day, and are then taken, they cannot be detained for the damage done on both days; but only for that done on the day on which they were distrained (*t*).

And each beast can be seized and detained for the damage which has actually been done by itself only, and

(*q*) *Hilton* v. *Hankesson*, 27 L. T. N. S. 519.

(*r*) *Boyle* v. *Tamlyn*, 6 B. & C. 329.

(*s*) *Wormer* v. *Biggs*, 2 C. & K. 31.

(*t*) *Vaspor* v. *Edwards*, 12 Mod. 660; Co. Litt. 161 a.

Part I. Chap. IX.

not for the general damage, or any part of it, which has been done by others (*u*).

If the cattle are once off the land they cannot be taken, even on fresh pursuit (*x*), although they may have been driven off the land purposely to avoid the distress, and within the view of the person coming to distrain them (*y*). The distress, however, will be justifiable if the distrainor actually entered upon the land whilst the cattle were in (*z*).

Second distress of cattle.

But if it appear that the party distraining had not actually got into the *locus in quo* before the cattle had got out of it, the justification cannot be supported (*a*). The same cattle may be distrained a second time for a new injury where they are caught trespassing again subsequently to a distress, even though they were replevied after the first (*b*).

Remedies.

Whenever a distress damage feasant may be made, an action of trespass may be maintained for the same grievance, and the form of remedy is at the election of the party injured; but both remedies cannot be pursued at the same time, for "*nemo debet bis vexari pro eadem causâ*." And the adoption of one is an entire waiver of the other (*b*).

If, however, cattle distrained damage feasant escape from the pound, or die without the fault of the distrainor, his remedy by action for the trespass still remains (*c*). But if the escape of the beasts is the fault of the distrainor, he is not entitled to an action of trespass (*d*).

Where seven horses are distrained damage feasant, and impounded, and supplied with food, and two of them were

(*u*) *Vaspor* v. *Edwards*, *supra*.
(*x*) *Id.*
(*y*) Co. Litt. 161 a.
(*z*) *Clement* v. *Milner*, 3 Esp. 95.
(*a*) *Id.*
(*b*) Bullen, 234.
(*c*) *Williams* v. *Price*, 3 B. & Ad. 695; *Vaspor* v. *Edwards*, 1 Ld. Raym. 719; Bac. Abr. Distress, F. 1.
(*d*) Bull. N. P. 84; Cas. temp. Holt, 257.

sold under the statute 5 & 6 Will. IV. c. 59, s. 4, and the produce was applied in discharge of the value of the food and expenses; it was held that as the statute authorizes the party to sell only so many animals as may be necessary to indemnify himself, he ought to have shown that it was necessary to sell more than one horse; for the party selling must exercise a reasonable discretion, and act *bonâ fide* (*e*).

Distress by person aggrieved, or his agent.

A distress of things damage feasant may be made as a distress for rent, either by the person aggrieved by the trespass, or by his bailiff or agent (*f*). Where a horse was proved to have been wrongfully distrained by the defendant's servant on the highway, and not on his land; it was held that no *primâ facie* case was made out, and that the defendant had authorized the distress in question by proof of his having, on other occasions, authorized his servant to distrain cattle damage feasant on his land (*g*).

Pound.

No particular form of notice is required in making the distress. The cattle or things seized should be driven to be impounded; and the same rules with regard to the pound, whether overt or covert, and to the supply of food to the beasts whilst in the pound, must be observed as in a distress for rent (*h*).

Abuse of the distress.

A distress of things damage feasant being still, as at common law, merely a pledge for the redress of the injury sustained, cannot be used or disposed of for the benefit of the distrainor. Neither the statute 11 Geo. II. c. 19, s. 19, nor the statute 2 Will. & Mary, sess. 1, c. 5, s. 2, extend to distresses taken damage feasant. So that any abuse of the distress makes the distrainor a trespasser *ab initio* (*i*); and, also, in no instance can a distress taken damage feasant be sold *as a satisfaction for the wrong done.*

(*e*) *Layton* v. *Hurry*, 8 Q.B. 811.
(*f*) Bullen, 237.
(*g*) *Lyons* v. *Martin*, 8 A. & E. 513.
(*h*) *Ante*, pp. 229 *et seq.*
(*i*) *Bagshaw* v. *Goward*, Cro. Jac. 147; *Gargrove* v. *Smith*, 1 Salk. 221.

Even when sold under the statute 5 & 6 Will. IV. c. 59, s. 4, in order to defray the expenses of food supplied to the animals, nothing can be retained in respect of the damage for which the distress was made, the statute directing *all* the overplus beyond the value of the food and expenses to be returned to the owner of the cattle (*k*).

If the distress is not sold under this statute it may be detained for any length of time until satisfaction is made, or the owner replevies it (*l*).

Distress damage feasant after tender of amends.

The same rules with regard to a tender of amends apply to the case of a distress damage feasant as in that of a distress for rent (*m*). So that a distress cannot be made after a tender of amends before the taking, nor can it be detained if a tender be made after the taking, and before the impounding. But *after* the impounding a tender comes too late to make either the taking or detainer unlawful (*n*).

The same rules also apply as to the person to whom the tender is to be made; although from the nature of the two causes of distress, and the position of the persons usually employed, a bailiff distraining things damage feasant is not so likely to be invested with authority to receive the tender as one distraining for rent (*o*).

As to impounding.

As to what is such an impounding that the tender comes too late, it has been held that where cattle distrained damage feasant are in a private pound, and the distrainor admits that they were about to be forwarded to a *public*

(*k*) *Mason* v. *Newland*, 9 C. & P. 575.

(*l*) Bullen, 239.

(*m*) *Ante*, pp. 291 *et seq.* Also per Patteson, J., in *Ladd* v. *Thomas*, 12 Ad. & Ell. 117.

(*n*) *Six Carpenters' case*, 8 Co. Rep. 147; *Thompson* v. *Jackson*, 1 Man. & G. 242; *Sheriff* v. *James*, 1 Bing. 341; *Gulliver* v. *Cosens*, 1 C. B. 788; *Lindon* v. *Hooper*, 1 Cowp. 414; *Knibbs* v. *Hall*, 1 Esp. 84; *Skeate* v. *Beale*, 11 Ad. & E. 983; *West* v. *Nibbs*, 4 C. B. 172; *Singleton* v. *Williamson*, 31 L. J. Ex. 17; *Ladd* v. *Thomas*, 7 H. & N. 747; *Anscomb* v. *Shore*, 1 Taunt. 261.

(*o*) Bullen, 236.

pound, a tender of amends made whilst they were in the *private* pound was held not to be too late (*p*). And where the plaintiff's bull trespassed on the defendant's land, and the defendant immediately impounded the bull *on his own premises* and refused to receive the sum of eighteenpence (which the plaintiff tendered to him as soon as he discovered that the bull was impounded), or to give up possession unless the plaintiff paid him 2*l.* (which he accordingly did under protest); it was held that he could recover the difference (namely, 1*l.* 18*s.* 6*d.*); for that if a person distrains cattle damage feasant upon *his own premises*, and the owner tenders the whole amount of damage at once, or as soon as he has an opportunity of doing so, the tender is not too late in order to be accepted by the distrainor; Hawkins, J., observing: "An animal in a *public* pound is in the custody of the law, and in that case I can well understand it being argued that the person who sent the animal to the pound would have no power to release it upon tender of the full amount of damage. Here the bull was in a *private* pound, that is to say, in a shed on the defendant's land; and the defendant need not have done anything but take the amount tendered for the damage (which was amply sufficient), open the door of the shed, and let the bull out. There is a wide difference between releasing the bull under those circumstances, and releasing him after he had been sent to a public pound"(*q*).

Distinction between public and private pounds.

We intend to treat upon the remedies for things taken wrongfully as damage feasant hereafter, with the remedies given for a wrongful distress for rent (*r*).

Remedies for a wrongful distress of things damage feasant.

It will be seen that if the distress be taken wrongfully as damage feasant, the owner may rescue it, or may have a remedy by replevin, trespass or trover. The action for illegal distress may be brought against the bailiff making

(*p*) *Browne* v. *Powell*, 4 Bing. 230.

(*q*) *Green* v. *Duckett*, L. R. 11 Q. B. D. 275.

(*r*) See *post*, Chap. XI.

it, or the owner of the land who authorizes it (if he can be charged), or against both (*s*).

Where to an action for taking the plaintiff's horse, the defendant pleaded that the horse was damage feasant on his land, and the horse was proved to have been wrongfully distrained by the servant of the defendant on the highway, and not on his land; it was held that no *primâ facie* case was made out that the defendant had authorized the distress in question by proof of his having on other occasions authorized his servant to distrain cattle damage feasant on his land, and that he had not adopted the act of his servant by pleading a justification of it (*t*). And where the defendant justified that he was lawfully possessed of a certain piece of land, and that he took cattle there damage feasant, the plaintiff was allowed to reply that he had a right to the possession of such piece of land, because a third party had a title to the land, and he entered on it as his servant, and by his command (*u*).

Where only one part of a distress, as one of several beasts, has been abused, the distrainor becomes a trespasser *ab initio* as to such part only (*x*).

(*s*) Bullen, 241. As to replevin in case of distress for damage feasant, see *post*, p. 347.

(*t*) *Lyons* v. *Martin*, 8 A. & E. 513.

(*u*) *Taylor* v. *Eastwood*, 1 East, 212.

(*x*) Per Holt, C. J., in *Dodd* v. *Morgan*, 6 Mod. 215.

Part II.

REMEDIES FOR WRONGFUL DISTRESS.

CHAPTER X.

OF RESCUE AND POUND BREACH.

Definition of rescue.

Rescue, or "*rescous*"(*a*), is "the forcible taking away by the owner or other person of things distrained before they are impounded from the custody of the distrainor." It is also defined by Lord Coke to be "a taking away and setting at liberty, against law, a distress taken or a person arrested by the process or course of law"(*b*).

If the distrainor has never been in the possession of the goods, as by his attempting to distrain and being prevented or disturbed in doing so, there is no rescue. But where some brewers let a public-house under an agreement which gave them all the remedies of landlords for rent against the tenant's effects for the recovery of any book debts for liquors sold by them to him, and on rent being in arrear they sent their bailiff who found an auctioneer on the premises under an execution, whereupon he showed him his warrant, took an inventory and made a valuation, and in disregard of this distress the tenant and the auctioneer proceeded to sell the goods, the auctioneer knocking them down and the tenant handing them to the purchasers; it was held that though the plaintiffs had not such a possession as to enable them to sue for a conversion, they could maintain an action for a rescue

(*a*) It is called "rescous," from recourser (*recuperare*— to take from, or recover).

(*b*) Bull. N. P. 84; Co. Litt. 160; Bullen, 206.

Part II. Chap. X.

against the auctioneer for knowingly assisting in transferring the dominion and property in the goods seized to the respective purchasers (*c*).

Rescue in law.

There may be a rescue in law as well as in deed. So where cattle distrained go upon the premises of the owner whilst being driven to the pound, and he refuses to deliver them up upon demand by the distrainor, this was held to be rescue in law (*d*). But where the plaintiff distrained the defendant's cattle damage feasant, and went to apprise the defendant, and during his absence the cattle escaped for half an hour into the defendant's ground, from whence the plaintiff on his return drove them to his own yard, the defendant was not guilty of a rescue for taking them from thence, as the leaving the cattle in the defendant's ground was an abandonment of the distress (*e*).

So if a man takes cattle which are straying in a common or lane, and they are rescued as he is taking them to the pound, this rescue is wrongful; but if he takes cattle which are damage feasant in the enclosed lands of a private occupier, the rescue of them before they get to the pound is not wrongful, as in this latter case till the cattle get to the pound he is considered to be the mere servant of the occupier (*f*).

Pound breach, definition of.

Pound breach is "the breaking the pound, or any part thereof, or retaking the things distrained after they are impounded;" for as soon as the distress is impounded in any lawful pound, whether off or on the premises, it is, as we have seen, in the custody of the law, and cannot be retaken without the party being guilty of a pound breach (*g*).

Actual force not necessary.

It seems that actual force is not necessary to constitute

(*c*) *Iredale* v. *Kendall*, 40 L. T. N. S. 362.
(*d*) Co. Litt. 161 a.
(*e*) *Knowles* v. *Blake*, 5 Bing. 499.
(*f*) *Rex* v. *Bradshaw*, 7 C. & P. 233.
(*g*) Bullen, 206; *Always* v. *Broome*, 2 Lutw. 1262.

the offence of pound breach; for where an attorney, assuming an authority to grant a replevin when he had none, granted a replevin in his own cause, he was considered guilty of a pound breach (*h*).

Where a bailiff in possession of goods under a landlord's distress received a *fi. fa.* from the sheriff, and sold the goods under it, the sheriff was held to be liable in an action of pound breach at the suit of the landlord (*i*).

And when the plaintiff, being the owner of a piano, lent it to A., whose landlord seized it under a distress for rent, and the landlord remained in possession of the piano for a fortnight, when the sheriff's officer seized it under an execution against A., and removed it to the premises of an auctioneer, who afterwards sold it; it was held that though the plaintiff might maintain an action of trover against the auctioneer, the landlord could not, his remedy being for pound breach against the sheriff's officer (*k*). But where the plaintiff levied a distress for rent in arrear, and impounded the goods on the premises, and whilst his bailiff was removing them the sheriff's officer came into the house and said that he had a *fi. fa.* against the plaintiff, and that he would not allow the goods to be removed, and the plaintiff's tenant thereupon ejected the plaintiff's bailiff, and brought back the goods which had been removed; it was held that these facts were not sufficient to entitle the plaintiff to maintain an action for a pound breach or rescue against the sheriff's officer (*l*).

Rescue before impounding.

Where a distress is altogether wrongful the party may lawfully make a rescue of it before it is impounded; as where the distress is made for something else than rent, or for rent which is not really due, or after sufficient tender, or in the night-time (except in the case of damage feasant),

(*h*) *Trevannion's case*, 11 Mod. 32.

(*i*) *Reddell* v. *Stowey*, 2 M. & Rob. 358.

(*k*) *Turner* v. *Ford*, 15 M. & W. 212.

(*l*) *Storey* v. *Finnis*, 6 Exch. 123.

Part II. Chap. X.

or on the highway, or where it is wrongful as to a part; as where, in making a lawful distress, the distrainor takes things absolutely privileged at common law or by statute, or beasts of the plough, or implements of trade, where there are other distrainable goods on the premises, or where the distress (before it is impounded) is unlawfully detained after tender of the arrears of rent due, and the charges of the taking (*m*).

By whom it may be made.

Rescue must be made by the tenant or owner of the goods by himself or by his agent or servant, and not by a stranger, who can have no right to dispute the distress (*n*). Therefore, if the goods of two persons are wrongfully seized in one distress, each person can only rescue his own goods, being a stranger to the remainder of the distress; but the one may justify as the servant of the other (*o*).

Abandonment of the distress.

Whenever the distrainor abandons and quits possession of the distress, the retaking of it by the tenant or owner is not a rescue (*p*). But if the distress has been impounded, the party cannot justify a breach of the pound to take it out, because the distress is then in the custody of the law (*q*).

Abuse of the distress.

But if a distrainor abuses a distress, as by taking horses out of a pound and working them, or attempting to kill sheep distrained, the owner may interfere and prevent this abuse; and no action can be maintained against him for pound breach or rescue (*r*).

We have already seen how, by the 12 & 13 Vict. c. 92,

(*m*) Bullen, 207; *Six Carpenters' case*, 8 Co. Rep. 146; *Bevil's case*, 4 Co. Rep. 11 b; Co. Litt. 47 b and 161 a; 9 Co. Rep. 23 b; *Keen* v. *Priest*, 4 H. & N. 240; *Firth* v. *Purvis*, 5 T. R. 433.

(*n*) Bro. Abr. Rescous, pl. 7 and 12; Roll. Abr. 673.

(*o*) *Jennyngs* v. *Playstowe*, Cro. Jac. 568; Bullen, 208.

(*p*) *Dodd* v. *Morgan*, 6 Mod. 216.

(*q*) *Cotsworth* v. *Bettison*, 1 Ld. Raym. 105.

(*r*) *Smith* v. *Wright*, 6 H. & N. 821. See also Co. Litt. 100 a; *Tresham's case*, 9 Co. Rep. 110 b.

s. 6, a person may enter a pound in order to supply the beasts therein with sufficient food on finding them neglected or starving without being liable to an action of trespass (*s*).

Remedies for unlawful rescue or pound breach.

At common law the remedy for an unlawful rescue was an action of trespass and assault upon the distrainor and bailiff; trover could not be maintained for it (*t*).

A rescue and a pound breach might be included in one action of trespass; as also might several distresses for several rents (*u*).

Where a warrant of distress for a rate which did not specify the time at which the distress was to be sold was held bad, a rescue of a distress taken under such a warrant was no criminal offence (*v*).

Who is entitled to the remedy.

The person entitled to the remedy was he in whose right the distress was made; therefore, if the distress were taken by the bailiff and rescued, the landlord, and not the bailiff, should bring the action; and he might recover not only for the rescue, but also for the battery of the servant and loss of service (*x*); except in the case of a distress by the Crown, where the bailiff making the distress is personally entitled to the remedy, and not the Crown (*y*).

Exception in case of the Crown.

The offence of pound breach was a still higher offence at common law than that of an unlawful rescue; for if a man broke the pound, or the lock of it, or any part of it, he "greatly offended against the peace, and committed a trespass against the King, and to the lord of the fee, the sheriffs and hundredors in breach of the peace, and to the party in delay of justice. So that even hue and cry might be raised against the offender, as against those who broke the peace, and the party who distrained might retake the

(*s*) *Ante*, p. 232.
(*t*) *Moneux* v. *Goreham*, 2 Selw. N. P. 9th ed. 1384; *Rex* v. *Cotton*, 2 Ves. sen. 288.
(*u*) Bullen, 209.
(*v*) *Reg.* v. *Williams*, 19 L. J. M. C. 126.
(*x*) *Alwayes* v. *Broome*, 2 Lutw. 1263.
(*y*) Bullen, 210.

goods again wherever he found them, and again impound them" (*z*).

But in the latter case he could not break open the house, or enter the grounds of a third person for that purpose, unless on fresh pursuit; and he could not be guilty of any breach of the peace in such recaption (*a*).

Remedy at common law.

The usual remedy for this injury at common law was also an action of trespass, brought by the person in whose right the distress was made, not by the bailiff who distrained, nor the pound keeper, or general owner of the pound.

It is important to state the old common law remedy of trespass for rescue and pound breach, because that is the only remedy which the party can have in a case of distress damage feasant, as the statute 2 Will. & Mary, sess. 1, c. 5, which we are about to give, applies only to distresses made for rent. By this statute, which is the most useful remedy at the present day for a rescue or pound breach in the case of a distress for rent, it is provided by sect. 4, "that upon any pound breach or rescous of goods or chattels distrained for rent, the person or persons grieved thereby shall in a special action on the case recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to come into his use or possession."

2 Will. & Mary, sess. 1, c. 5.

Treble damages.

It is no defence to an action on this statute that the defendant made a tender of the rent and costs after the impounding (*b*).

As we have seen, an action of trover is not maintainable by the landlord for goods distrained by him, as he has neither any property in them, nor the constructive possession of them. It has been decided that the word "treble"

Treble costs

(*z*) Co. Litt. 47 b, 160 b; Woodfall's L. & T. 12th ed. 453; Bullen, 211.

(*a*) *Rich* v. *Woolley*, 7 Bing. 965; Co. Litt. 47 b; Harg. n. 303.

(*b*) *Firth* v. *Purvis*, 5 T. R. 432.

in the above statute refers to the costs as well as the damages, and, therefore, "treble costs" might be given. But "treble costs" are now abolished by the statute 5 & 6 Vict. c. 97, which by sect. 2 repeals all previous statutes giving double or treble costs, and provides that instead of such costs the parties entitled thereto shall recover "such full and reasonable indemnity as to all costs and charges incurred in and about any action, &c., as shall be taxed by the proper officer in that behalf" (*c*).

now abolished.

In an action for rescue of goods distrained for tolls under the authority of a statute, which gives a right of distraining for particular goods only, it must be shown that the goods taken were such as the plaintiffs were empowered to distrain; but this need not be done in the case of pound breach, because the goods are in the custody of the law, and the defendants have no right to retake them (*d*).

In an action for pound breach the allegations that the premises on which the goods were seized and impounded were held by the plaintiff as landlord, and that the rent was in arrear, are material allegations, because they show how the plaintiff is the person aggrieved by the pound breach (*e*).

To what the 6 & 7 Vict. c. 30 extends.

The statute 6 & 7 Vict. c. 30, which amends the law relating to pound breach and rescue in certain cases, does not extend to distress for rent, but applies only to distress of cattle damage feasant. By sect. 1 of that statute, after reciting that it frequently happens that cattle which are lawfully impounded, or which are lawfully seized for the purpose of being impounded, are rescued from the pound or place in which they are so impounded, or on the way

(*c*) As to whether this Act is repealed or not, see *Garnett* v. *Bradley*, L. R. 3 App. Cas. 970; and Rules of 1883, Ord. LXV. r. 1; Wilson's Judicature Acts, 4th ed. p. 527.

(*d*) *Parrott Navigation Co.* v. *Stower*, 6 M. & W. 564.

(*e*) *Berry* v. *Huckstable*, 14 Jur. 718.

Part II. Chap. X.

to or from such pound or place, and the expense of prosecuting such offenders, or obtaining redress for the injury occasioned by such rescue to the person so entitled to distrain is usually out of proportion to the damage for which such cattle are distrained, it is enacted that "in case any person or persons shall release or attempt to release any horse, ass, sheep, swine, or other beast or cattle which shall be lawfully seized for the purpose of being impounded, in consequence of having been found wandering, straying, or lying, or being depastured on any enclosed land without the consent of the owner or occupier of such enclosed land, from the pound or place where the same shall be so impounded, or on the way to or from any such pound or place, or shall pull down, damage, or destroy the same pound or place, or any part thereof, or any lock or bolt belonging thereto, or with which the same shall be fastened, every person so offending shall, upon conviction thereof before any two of her Majesty's justices of the peace, forfeit and pay any sum not exceeding 5*l.* together with reasonable charges and expenses, or in default thereof be committed by such justices by warrant under their hands and seals to the house of correction of the county wherein the said offence shall have been committed, there to be kept to hard labour; and it shall be lawful for the said justices to award the whole or any portion of such penalty to the person or persons on whose behalf such cattle were distrained."

Release of cattle, &c., from the pound.

Damage to pound.

Penalty.

An information was laid against certain persons for having unlawfully released certain cows, heifers, and bullocks which had been lawfully seized for the purpose of impounding. The justices, holding that the bullocks, &c., were not included in the words "other beasts or cattle" in this section, dismissed the complaint on the ground of their want of jurisdiction. A rule *nisi* for a mandamus ordering them to hear and determine the matter having been obtained; it was held that it must be

made absolute, as the justices had improperly declined jurisdiction under the statute in question (*f*).

Ousting of justices' jurisdiction.

By sect. 2 it is provided, that "Nothing herein contained shall authorize any justices of the peace to hear and determine any case of pound breach or rescue in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or any execution under the process of any court of justice, or as to the obligation of maintaining, repairing, or keeping in repair, any wall, hedge, paling, ditch, sunk fence, or fence whatsoever" (*g*).

(*f*) *Reg.* v. *Gee, JJ. of Chesterfield*, 1 Times Law Rep. 388.

(*g*) Sects. 3 and 4 have been repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43).

CHAPTER XI.

REMEDIES FOR WRONGFUL DISTRESS.

The question as to what remedy a tenant is entitled to if the distress be illegally levied, or improperly pursued, may be placed under two different heads.

Firstly, what is the remedy where the distress is wholly unwarranted and unjustifiable?

Secondly, where the distress is for a lawful demand, and justifiable; but the proceedings taken in such distress are illegal.

Form of action.

Previously to the Judicature Acts the form in which the action was brought was of great importance; and even now the damages in suits of this nature depend to a great extent upon such forms; for though by the Judicature Acts forms of action have been done away with, yet the old decisions with regard to such forms are of importance. For where a defendant can be treated as a trespasser *ab initio*, so as to make his possession of the goods wholly wrongful, the entire value will be recoverable. But when it is necessary to sue for consequential damages, the plaintiff can only obtain damages for the special injury which he has sustained (*a*).

Wrongful distress.

A distress may be *altogether wrongful;* where, for instance, it is made for something which cannot be reserved as a rent, or for rent which is not due (*b*), or after a sufficient tender has been made, or where it is made in the night-time, or on the highway (*c*), or where the party dis-

(*a*) Mayne on Damages, 4th ed. 402. See County Court Rules, 1889, as to remittance of action to County Court, Ord. XXXIII. r. 1, and Form 75 C.

(*b*) *Yates* v. *Tearle*, 13 L. J. Q. B. 289.

(*c*) Bullen, 179.

training is a mere stranger, and has no pretence whatever to make any claim for rent. In such cases formerly the tenant might have an action of trespass, trover, or detinue; and he may now pursue any remedy adapted by law to a violent seizure of goods. So he may rescue or replevy them, in which latter case he will have the goods restored to him; or he may bring an action claiming the return of the goods *in specie* (*d*); or he may recover their full value, or of such part of them as were not subject to distress.

Remedies.

So, as we have seen, where a landlord distrained upon the sheep of an under-tenant which were privileged, there being other goods on the premises sufficient to satisfy the rent, the owner of the sheep so seized was entitled to recover from the distrainor not merely nominal damages, but the full value of the goods so seized (*e*). And again, a pawnbroker was held entitled to recover the full value of goods pledged with him and distrained by the landlord for rent, and not merely the amount which he had advanced on them (*f*).

Damages recoverable.

In one case, where a distress was void *ab initio* by bailiffs entering and forcibly breaking through a window, Cockburn, C. J., remarked: "If a man under colour of legal authority distrains, and does that which makes him a trespasser *ab initio*, he is in the same position as a total stranger would have been. And if a stranger had seized, he could not have said by way of defence that he had applied the proceeds of the goods for the benefit of the party bringing the action against him. The plaintiff has

Where distress is void *ab initio*.

(*d*) *Pusey* v. *Pusey*, 1 White & T. Lead. Cas. on Equity, 5th ed. p 890, and notes thereto; 36 & 37 Vict. c. 66, s. 24, sub-s. 7; 37 & 38 Vict. c. 83, 1st sched.; Sm. L. & T. 3rd ed. 272, note (*e*).

(*e*) *Keen* v. *Priest*, 4 H. & N. 236.

(*f*) *Swire* v. *Leach*, 18 C. B. N. S. 479; *Nargatt* v. *Nias*, 1 El. & El. 439. No deduction need be made from such value in respect of the rent due from the tenant.

Part II. Chap. XI.

a right to say, 'I demand to be restored to the position I stood in before the seizure'" (*g*).

As we have seen, mere nonfeasance, as refusing to return a distress upon tender made after seizure, will not make the original taking, but only the subsequent detainer, wrongful (*h*).

Trespasser *ab initio* as to part of the thing distrained.

But where a party becomes a trespasser *ab initio* as to part of the thing distrained on, this does not make the distress void as to the rest. So where several barrels of beer were distrained for rent, and the distrainor drew beer out of one of them, it was held that this made him a trespasser *ab initio* as to this one only (*i*). And where a landlord distrained for rent due, and amongst other things seized some looms in work, there being sufficient without them to satisfy the rent, and the tenant paid the rent and the costs of the distress, upon which the distress was withdrawn altogether; it was held that the tenant was entitled to recover only nominal damages, namely, only the actual damage sustained by the taking of those particular goods, and not the whole amount paid by him. For in such a case the distrainor is a trespasser *ab initio* only as to the goods which were not distrainable (*j*).

Distress taken in the highway. Statute of Marlbridge.

Where a distress is wrongful because taken in the highway, if the party grieved seeks any further remedy than that of rescue, it must be by an action on the Statute of Marlbridge (*k*), which enacts, that no "man shall take distresses in the King's highway, nor in the common street, but only the King, or his officers having special authority to do the same"; and formerly the party was

(*g*) *Attack* v. *Bramwell*, 3 B. & S. 529; *Nixon* v. *Freeman*, 5 H. & N. 647; *Edmondson* v. *Nuttall*, 17 C. B. N. S. 280.

(*h*) *Six Carpenters' case*, 8 Rep. 146 a; *Jacobsohn* v. *Blake*, 6 M. & G. 919.

(*i*) *Dodd* v. *Morgan*, 6 Mod. 215; *Lamont* v. *Southall*, 5 M. & W. 416.

(*j*) *Harvey* v. *Pocock*, 11 M. & W. 740.

(*k*) 52 Hen. 3, c. 15.

obliged to take advantage of this statute in the first instance, as he could not avail himself of it by pleading it in bar to an avowry (*l*).

In the case of a distress made and sold when no rent is owing, the owner of the goods distrained has now a more complete remedy by statute than he formerly had by the common law. For the statute 2 Will. & Mary, sess. 1, c. 5, enacts that "where any distress and sale shall be made by virtue and colour of that Act for rent *pretended to be in arrear and due*, where in truth none is in arrear or due, then the owner of such goods so distrained and sold, his executors or administrators, may by action of trespass, or upon the case, to be brought against the person so distraining, or his executors or administrators, recover *double the value* of the goods so distrained and sold, together with full costs of suit" (*m*).

2 Will. & Mary, sess. 1, c. 5, s. 5.

Recovery of double value.

From the terms of this Act it seems that a sale must take place in order to complete the offence which it is intended to remedy. In such an action the jury must be directed to give double the value of the goods, and cannot give nominal damages (*n*).

Of course, in order to determine when a party is entitled to maintain an action for a wrongful distress, it must first be considered whether a *taking*, supposing it to be wrongful, has been really made.

What is a "taking."

We have already mentioned those cases which decide what does and what does not amount to a distress. But the exercise of a right of action and a claim to damages is not prevented by the fact that whilst the distrainor remained in possession the plaintiff had the free use of his goods; and a tenant was held entitled to recover on proving the seizure of his goods and the keeping a man in possession, without showing any further damage (*o*).

(*l*) 2 Inst. 131; Bullen, 182.

(*m*) See County Court Rules, 1889, O. IV. r. 1.

(*n*) *Masters* v. *Farris*, 1 C. B. 715; *Hoare* v. *Lee*, 17 L. J. C. P. 196.

(*o*) *Baylis* v. *Fisher*, 7 Bing. 153.

Waiver of right of action.

Neither does the tenant waive his right of action by entering into an agreement with the distrainor respecting the sale of the goods seized; for a right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction for the wrong done (*p*).

Another reason why it is material to distinguish the various kinds of wrongful distress, is that regard should be had to the persons against whom the tenant can proceed; for in the case of an illegal distress the action should be brought against the person actually committing the illegal act, and not against the landlord, unless it can be shown that he expressly authorized the act, or adopted or ratified it afterwards (*q*).

As has been seen before, in addition to proceeding for damages for the illegal distress the tenant may proceed in an action for return of the goods, and for damages for detaining the same, or for wrongfully depriving him of the goods against the person who has come into possession of such goods; and he will have the same rights as to the amount of damages recovered as in the former mode of action (*r*). So also actions may be maintained by other persons whose goods are taken who are not tenants of the landlord purporting to distrain. There is now one form of indorsement of the writ provided for all claims for damages arising from a wrongful distress (*s*); and this

Form of indorsement of writ.

(*p*) *Willoughby* v. *Backhouse*, 2 B. & C. 821; *Sells* v. *Hoare*, 1 Bing. 401. Where a tenant assigns her interest in the premises, but still remains on the premises, and the assignee does not enter, she is merely the agent of the assignee, and cannot maintain an action for illegal distress. *Nash* v. *Lucas*, 16 L. T. N. S. 610.

(*q*) *Lewis* v. *Read*, 13 M. & W. 834; *Freeman* v. *Rosher*, 13 Q. B. 780; *Gauntlett* v. *King*, 3 C. B. N. S. 59; *Haseler* v. *Lemoyne*, 5 C. B. N. S. 530; *Hurry* v. *Rickman*, 1 Moo. & Rob. 126; *Moore* v. *Drinkwater*, 1 F. & F. 134; *Green* v. *Wise*, W. N. 1877, p. 130.

(*r*) For forms, see Jud. Act, 1875, App. A. Part III. s. 4.

(*s*) Rules of Supreme Court, 1883, and forms thereto.

form is stated to be sufficient, whether the distress complained of be wrongful, or excessive, or irregular, and whether the claim be for damages only, or for double value.

Statement of claim.

No specimen statement of claim or defence is given to the Appendix to the Rules of the Supreme Court.

A landlord who has sold his tenant's goods under a distress for rent, and is not guilty of any misconduct with regard to the distress, is not liable in an action by the tenant to recover the overplus money in the landlord's hands as money had and received. The proper remedy is an action of tort against the landlord for not paying over the overplus to the sheriff pursuant to the statute 2 Will. & Mary, sess. 1, c. 5, s. 2 (*t*).

Evidence.

If a tenant who sues his landlord for a wrongful distress does not put in the agreement for the tenancy, the jury, as against him, may infer its terms from his own admission or his own evidence (*u*).

Summary remedy in metropolitan police district.

A summary remedy has been given for wrongful distresses within the metropolitan police district. For by the statute 2 & 3 Vict. c. 71 (An Act for regulating the Police Courts in the Metropolis) it is enacted, by sect. 39, that "on a complaint made to any of the said magistrates by any person who shall within the metropolitan police district have occupied any house or lodging by the week or month, whereof the rent does not exceed the value of 15*l.* by the year, that his goods have been taken from him by an unlawful distress, or that the landlord, or his broker or agent, has been guilty of any irregularity or excess in respect of such distress, it shall be lawful for such magistrate to summon the party complained against, and if upon the hearing of the matter it shall appear to the magistrate

Summons.

(*t*) *Yates* v. *Eastwood*, 6 Exch. 805; *Evans* v. *Wright*, 2 H. & N. 527.

(*u*) *Cowne* v. *Cordery*, 10 W. R. 347.

Part II. Chap. XI.

that such distress was improperly taken, or unfairly disposed of, or that the charges made by the party having distrained or having attempted to distrain are contrary to law, or that the proceeds of the sale of such distress have not been duly accounted for to the owner thereof; it shall be lawful for the magistrate to order the distress so taken, if not sold, to be returned (*u*) to the tenant on payment of the rent which shall appear to be due, at such time as the magistrate shall appoint, or if the distress shall have been sold, then to order payment to the said tenant of the value thereof, deducting thereout the rent which shall so appear to be due, such value to be determined by the magistrate; and such landlord or party complained against in default of compliance with any such order, shall forfeit to the party aggrieved the value of such distress, not being greater than 15*l.*, such value to be determined by the magistrate."

Order for return of the distress.

This enactment is permissive only, and does not prevent a tenant suing for double value in cases where he is enabled to do so. It will be observed that it is confined to distresses for rent made within the metropolitan police district (*x*); also to cases where the rent does not exceed 15*l.* per annum, *or* the tenancy was by the week or month (*y*).

Where a right to distrain clearly exists, and therefore the party exercising it is not guilty of a wrongful distress, he may still be guilty of conducting it in an irregular manner. Prior to the statute 11 Geo. II. c. 19, any irregularity in a distress rendered the distress unlawful, and the party distraining a trespasser *ab initio*, so that the full value of the rent for which the distress was taken might be recovered by action (*z*). But this hardship upon landlords was remedied by that statute, which, by sect. 19,

Irregular distress.

(*u*) See *ante*, p. 163.

(*x*) The limits of such district are defined in the schedule to 10 Geo. 4, c. 44.

(*y*) Woodfall's L. & T. 12th ed. 497.

(*z*) *Six Carpenters' case*, 1 Sm. L. C. 8th ed. 143; 8 Rep. 146 a.

enacts that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be deemed to be unlawful, nor the party or parties so making it be therefore deemed a trespasser or trespassers *ab initio*, but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass or on the case, at the election of the plaintiff or plaintiffs; provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she, or they shall be paid his, her, or their full costs of suit, and have all the like remedies for the same as in other cases of costs" (*a*).

11 Geo. 2, c. 19, s. 19.

Recovery of special damage.

Costs.

And by sect. 20, "No tenant or tenants, lessee or lessees, shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends hath been made by the party or parties distraining, his, her, or their agent or agents before such action brought."

If amends be tendered under this section, the landlord need not, in the case of action, pay the money into Court (*b*).

Decisions on the statute.

As has been seen, there are many cases to which sect. 19 does not apply; for instance, it does not apply to damage feasant, being expressly confined to distresses for rent; nor does it apply where the distress is void *ab initio*, which we have recently treated upon, nor does it apply to any independent act, irrespective of the distress, as, for instance, where a landlord, after making a distress, turned the tenant out of possession (*c*); although, if the irregularity be in the nature of a distress wrongful as to a part—as if in making a lawful distress the distrainor takes things

Does not apply to damage feasant.

Nor where distress void *ab initio*.

(*a*) See *Rocke* v. *Hills*, 3 Times Law Rep. 298.

(*b*) *Jones* v. *Gooday*, 9 M. & W. 736.

(*c*) *Etherton* v. *Popplewell*, 1 East, 139.

Part II. Chap. XI.

which are absolutely privileged—the same remedies are available in respect of such irregularity as would have been available if the whole proceeding had been wrongful; yet where the injury complained of is a *mere irregularity*, as for not properly impounding the distress, for using or destroying it, for selling too soon, without notice, or without due appraisement, or for remaining upon the premises an unreasonable time beyond the five days; in these and the like cases the party aggrieved has now only the remedies mentioned in the statute.

Mere irregularity.

Form of action.

And the true construction of this statute seems to be, that an action on the case must be brought when the injury complained of is the subject of an action on the case, and an action of trespass, where it amounts to a trespass; for the nature of the irregularity determines the nature of the action. This was well illustrated in the case of *Winterbourne* v. *Morgan* (*d*), where a person who entered under a warrant of distress for rent in arrear continued in possession of the goods on the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the statute; and it was held, that at any rate he was liable in trespass for continuing on the premises, and disturbing the plaintiff in the possession of his house after the time allowed by law. In this case, Le Blanc, J., says, "All that the Act seems to say was, that a party whose entry was lawful to take a distress on the premises should not be made a trespasser *ab initio* for any subsequent irregularity, as he was deemed to be before that Act. The object of it was to separate that which he had a right to do from that which was irregular and unlawful; and, therefore, it meant to say that the landlord should not be deemed a trespasser for entering and taking the goods in the first instance, or for continuing in possession of them on the premises for as long time as the law allowed him to con-

Winterbourne v. *Morgan*.

(*d*) 11 East, 395.

time there; but that if he continued there after that time he should be treated as a trespasser for that which was in law a trespass, or be liable to an action on the case for such injuries as would in law subject him to that remedy by the party aggrieved, according to the nature of the act done by him. I admit that if he did not continue on the premises after the time allowed by law, but were guilty of an irregularity during that time, he would not be liable in trespass; because his continuance there for the purpose of guarding the distress would be lawful. But here he remained there *after* that time; and that, I think, made him a trespasser, even if he had not taken away the goods afterwards."

But where the irregularity is a mere omission, or a wrong not in the nature of a trespass, as the omitting to appraise the goods before selling them, case must be adopted, and trespass will not lie (*e*).

Nominal damages.

It was for some time thought that under this section a plaintiff might always recover nominal damages; but it is now settled that he can only recover where actual damage is proved (*f*). And it is necessary that he should state correctly to whom the rent distrained for is due (*g*).

Cases of irregularity.

We will now specify some of the numerous cases of irregularity which may occur, and for which actions may consequently be brought under this statute.

It has been held that trover would not lie since the 11 Geo. II. c. 19, for goods distrained, where they had been merely irregularly sold; nor in the case of a sale of them after the service of an irregular notice of replevin without removing the goods off the premises; for that was not a remedy which could be pursued since the statute 11 Geo. II. c. 19, as it tended to place the landlord in the

Sale after notice of replevin.

(*e*) *Messing* v. *Kemble*, 2 Camp. 115.

(*f*) *Rogers* v. *Parker*, 18 C. B. 112; *Lucas* v. *Tarleton*, 3 H. & N. 116.

(*g*) *Ireland* v. *Johnson*, 1 Bing. N. C. 162.

Part II. Chap. XI.

same situation as before the passing of the Act, by considering him as a trespasser *ab initio* (*h*). But if a landlord severs fixtures under a distress, the tenant may now sue for their value and describe them as goods and chattels converted by the landlord to his own use. Formerly he might have brought trover for them, and described them as goods and chattels, although trover would not have lain for fixtures unsevered from the freehold (*i*).

Severance of fixtures.

The plaintiff does not waive his right of maintaining that the distress is illegal because fixtures cannot be distrained for rent in arrear (*k*).

Measure of damages where goods sold without appraisement.

In an action for selling goods without an appraisement, the measure of damages is the value of the goods, minus the rent due (*l*). And if the sum produced by the sale of such goods is less than the fair value to the tenant, he may recover the difference without any allegation of special damage (*m*). Again, if a person who has acted as the agent of a landlord in the matter of a distress is one of the appraisers, a sale of the goods distrained is irregular; and in an action for such sale, the measure of damages is the full value of the goods to the tenant at the time of the distress, less the amount due for rent (*n*).

Removal of the distress.

Actions also lie for not removing the distress in a reasonable time (*o*); or for locking up the whole of the premises and excluding the tenant (*p*); and the measure of damages will be the actual loss sustained (*q*).

(*h*) *Wallace* v. *King*, 1 H. Bl. 13; *Cuckson* v. *Winter*, 2 M. & Ryl. 313; *Whitworth* v. *Smith*, 1 M. & Rob. 193.

(*i*) *Dalton* v. *Whittem*, 3 Q. B. 961; *Roffey* v. *Henderson*, 17 Q. B. 574; *Wilde* v. *Waters*, 16 C. B. 637.

(*k*) *Dalton* v. *Whittem*, *supra*.

(*l*) *Knight* v. *Egerton*, 7 Exch. 407; *Biggins* v. *Goude*, 2 Cromp. & Jer. 364; *Notts* v. *Curtis*, 5 C. & P. 322; *Whitworth* v. *Maden*, 2 C. & K. 517.

(*m*) *Notts* v. *Curtis*, *supra*.

(*n*) *Rocke* v. *Hills*, 3 Times Law Rep. 298.

(*o*) Com. Dig. Distress, I.

(*p*) *Smith* v. *Ashforth*, 29 L. J. Ex. 259.

(*q*) Mayne on Damages, 4th ed. 406.

In an action for not selling a distress at the best price, the plaintiff was allowed to prove that the goods were left standing in the rain, and that they were improperly allotted (*r*).

Best price.

Reasonable care must be used to obtain the best price. The price at which the goods have been appraised will be presumed to be the best price until the contrary is shown (*s*), but the appraised value is not conclusive, unless the jury are satisfied that the best means were taken to ascertain such value; and the fact that they sold for no more makes no difference (*t*). The price realized at a sale by auction has been held to be *primâ facie* evidence of the value of the goods (*u*).

Neglect to give copy of costs.

So an action will lie against a person who neglects to give a copy of his costs and charges (*x*), or who omits to leave the overplus of the proceeds of a distress with the sheriff, under-sheriff, or constable, under the 2 Will. & M. c. 5, s. 2 (*y*), or against a distrainor for taking excessive charges (*z*), or who wrongfully seizes and sells unripe growing crops under the 11 Geo. II. c. 19, s. 8 (*a*); so, also, for distraining beasts of the plough or sheep whilst there are other and sufficient available subjects of distress on the premises. As we have seen, the only remedy for this besides rescue is under the statute 51 Hen. III. st. 4 (*b*).

Driving distress out of county.

So, also, for driving a distress out of the county, or impounding it in several places; the remedy for which is given by the statute 1 & 2 Phil. & M. c. 12, s. 1 (*c*).

(*r*) *Poynter* v. *Buckley*, 5 C. & P. 512.

(*s*) *Walter* v. *Rumbal*, 4 Mod. 390; Bullen, 192.

(*t*) *Clarke* v. *Holford*, 2 C. & K. 540.

(*u*) *Rapley* v. *Taylor*, 1 C. & E. 150.

(*x*) *Ante*, pp. 209, 261, 262; *Hart* v. *Leach*, 1 M. & W. 560.

(*y*) *Ante*, pp. 262, 263.

(*z*) *Ante*, p. 263; *Hills* v. *Street*, 5 Bing. 37.

(*a*) *Ante*, p. 124; *Owen* v. *Leigh*, 3 B. & Ald. 470; *Proudlove* v. *Twemlow*, 1 C. & M. 326.

(*b*) *Ante*, p. 146.

(*c*) *Ante*, p. 236.

Part II. Chap. XI.

In actions for irregular distresses, the proper practice is to make either the landlord alone, or the landlord and broker defendants, and not to join appraisers and other persons concerned (*d*).

We have already mentioned in what ways the landlord is liable for the acts of his brokers and agents (*e*).

We have also mentioned that a pound keeper is not answerable for a wrongful distress, unless he exceeds his duty (*f*). And in an action of trover for a chattel wrongfully distrained, it has been held that the mere fact of making an inventory, or drawing a notice, is not sufficient to subject a person to be joined as a defendant, unless he interfered with the goods or with the disposition of them (*g*). So, also, where goods were distrained which were not liable to a distress, it was held that an action of trover could be brought by the owners without a demand of the goods and refusal (*h*). And if a party pays money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer (*i*).

11 Geo. 2, c. 19, s. 21.

It is enacted by the statute 11 Geo. II. c. 19, s. 21, that "in all actions of trespass, or upon the case, to be brought against any person or persons entitled to rents or services of any kind, his, her, or their bailiff or receiver, or other person, relating to any entry by virtue of that Act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale, or disposal of any goods or chattels thereupon, it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue and give the special matter in evidence, any law or usage to the contrary notwithstanding;

(*d*) *Child* v. *Chamberlain*, 6 C. & P. 213, 484.

(*e*) *Ante*, p. 207. See *Crabb* v. *Killick*, 3 C. & P. 216; *Jones* v. *Buckley*, 2 Jur. 204; *Hurry* v. *Rickman*, 1 M. & R. 126.

(*f*) *Ante*, p. 235; *Branding* v. *Kent*, 1 T. R. 62.

(*g*) *Ward* v. *Haydon*, Esp. 552.

(*h*) *Ward* v. *Ventom*, 2 Peake, 126.

(*i*) *Shipwick* v. *Blanchard*, 6 T. R. 298.

and in case the plaintiff or plaintiffs shall become nonsuit, discontinue his or their action, or have judgment against him, her, or them, the defendant or defendants shall recover double costs of suit."

Decisions on the statute.

This section does not seem to apply to unlawful distresses, but only to those which are irregular or excessive.

The defendant is not bound to avail himself of the section, but may, it is conceded, enter a defence in the ordinary form. If he pleads payment of money into Court, he is not entitled to the costs given by this section. In order to have the benefit of the above Act he should show either that he tendered sufficient amends before action brought, or that the plaintiff had no cause of action (*k*).

We have already mentioned that "double costs" are now done away with.

"Not guilty by statute."

The plea of "not guilty by statute" given by this section is limited by the Judicature Acts (*l*) in this respect, that no other defence can be pleaded with it except by the leave of a Court or a judge. This plea not only puts in issue the wrongful act complained of, but also the tenancy itself, the ownership of the goods, the distress, and all matters of justification (*m*). It has been decided under this section that a landlord obtaining judgment may recover his double costs, though he has pleaded specially (*n*).

The landlord can only justify for acts done *as landlord* (*o*).

The section does not extend to a distress made off the premises on goods fraudulently removed (*p*).

(*k*) *Handcock* v. *Foulkes*, 9 M. & W. 431.

(*l*) R. S. C. Ord. XIX. r. 12. But see *Neale* v. *Mackenzie*, 1 M. & W. 747.

(*m*) *Williams* v. *Jones*, 11 Ad. & Ell. 643; *Ross* v. *Clifton*, *ibid.* 631; *Nash* v. *Lucas*, 16 L. T. N. S. 610.

(*n*) *Gambrell* v. *Earl of Falmouth*, 5 Ad. & Ell. 403.

(*o*) Gilbert's Distress, by Impey, p. 75; Bullen, 198.

(*p*) *Vaughan* v. *Davis*, 1 Esp. 257; *Furneaux* v. *Fotherby*, 4 Campb. 136; *Postman* v. *Harrell*, 6 C. & P. 225. See *Jones* v. *Williams*, 11 A. & E. 643.

Part II. Chap. XI.

In conclusion, we will again call our readers' attention to sect. 20 of the 11 Geo. II. c. 19 (*q*), which provides that a plaintiff shall not recover in any action for an irregularity if a tender of amends be made before action brought.

Of an excessive distress.

The landlord and broker in distraining are bound to use due care and reasonable judgment, skill, and discretion with regard to the quantity and value of the goods they take in reference to the demand for which the distress is made. If a reasonable proportion is not observed between the amount of rent due and the goods seized, the party distraining will be guilty of an excessive distress.

At common law.
51 Hen. 3, st. 4.
52 Hen. 3, c. 4.
28 Edw. 1, st. 3, c. 12.

Excessive distresses were always illegal at common law, and were also declared to be so very early by statutory enactments. First of all, by the stat. 51 Hen. III. st. 4 (*De districtione scaccarii*), and subsequently by the Statute of Marlbridge (52 Hen. III. c. 4), and the 28 Edw. I. st. 3, c. 12. The terms of the fourth chapter of the Statute of Marlbridge are, that "distresses shall be reasonable and not too great, and that he who takes great and unreasonable distresses shall be grievously amerced for the excess of such distresses."

In former times the only proper remedy for an excessive distress was by an action on the case (*r*), except where the distress was so excessive on the face of it that some of the things must be supposed to have been taken without any shadow of claim; as where six ounces of gold and 100 ounces of silver were taken for 6*s.* 8*d.* (*s*). If an excessive distress be altogether wrongful, or if in the conduct of it any irregularity is committed, which in its nature is the

When trespass maintainable.

(*q*) See *ante*, p. 327.

(*r*) *Hutchins* v. *Chambers*, 1 Burr. 579; *Lynne* v. *Moody*, 2 Stra. 851; *Woodcraft* v. *Thompson*, 3 Lev. 48; *Hughes* v. *Browne*, 7 Ir. L. R. 492.

(*s*) *Hutchins* v. *Chambers*, *supra*; *Crowther* v. *Ramsbotham*, 9 East, 298; *Moir* v. *Munday*, 1 Burr. 590.

subject-matter of an action of trespass, for this separate cause of action trespass may be maintained (*t*).

A criminal prosecution will not lie for an excessive distress (*u*). To make a seizure tortious it is not necessary that the party should be guilty of a criminal act. If he takes that which he has no right to take he is immediately liable to a civil action (*x*).

What is excessive.

A distress to be excessive must be obviously unreasonable. So where a tithe owner seized under a distress for 39*l.* a rick of wheat valued at 62*l.*, there being smaller ricks upon the premises, the straw of which the tenant was bound to consume on the premises, and the tithe owner sold the rick for 42*l.*, subject to the purchasers leaving the straw; it was held that this was not an excessive distress, that the tithe owner was not bound to sell the straw, that the whole rick might be taken, and that a party seizing under a distress is bound only *not to take what is manifestly excessive;* Wilde, C. J., observing: "The Statute of Marlbridge, which gives a remedy for an excessive distress, points at cases of flagrant abuse of the process of law; and Lord Coke, in commenting upon it, puts such illustrations as distraining two or three oxen for twelve pence, or the like small sum, and other cases of flagrant abuse. A party entitled to a distress is not bound to be strict as to the amount seized, but need only use reasonable care and caution, and must not seize what is clearly excessive" (*y*).

Where there is only one thing found upon the premises which can be taken as a distress the distress will not be excessive, however great the value of that thing may be (*z*).

(*t*) *Lynne* v. *Moody*, 2 Stra. 851; *Etherton* v. *Popplewell*, 1 East, 139.

(*u*) *Rex* v. *Bradshaw*, 7 C. & P. 233; Bullen, 201.

(*x*) Per Lord Kenyon, C. J., in *Ward* v. *Ventom*, 2 Peake, 126.

(*y*) *Roden* v. *Eyton*, 6 C. B. 427; *Field* v. *Mitchell*, 6 Esp. 71; *Willoughby* v. *Backhouse*, 2 B. & C. 823.

(*z*) *Field* v. *Mitchell, supra; Avenell* v. *Croker*, Moo. & Malk. 172.

Part II. Chap. XI.

Where distress wrongful as well as excessive.

Where a distress is altogether wrongful, as where the rent has been tendered before the levy, if it be also excessive the party grieved might waive his right to maintain trespass, and sue in case for the excess (*a*). But it seems that a plaintiff in such case was obliged to make his election as to the injury for which he would sue, and could not recover both for a wrongful and for an excessive distress (*b*). Thus, a recovery in replevin was held to be a bar to an action for an excessive distress, upon the ground that the plaintiff had already recovered his goods, and damages for their detention; and as in the previous action he had pleaded the taking as wholly tortious, he could not be permitted to say that it was rightful in part (*c*).

But where a landlord of a warehouse, let with heavy weighing machines, distrained property to an excessive amount, and locked up the warehouse so as to keep the tenant excluded, and the proceeds of the sale, less the expenses, did not equal the amount of the rent due, but there was evidence that the value was ten times that amount, and the tenant sued both in trespass and for an excessive distress, a verdict for the plaintiff on both counts, and upon each of them for substantial damages, was upheld (*d*).

Property in the goods must be shown.

The plaintiff must show that he has such a *property* in the goods as will allow him to maintain an action for their excessive distress. So where the plaintiff was the tenant of a house, and his rent having fallen into arrear the landlord distrained to an excessive amount, and it appeared that all the goods in the house had been assigned to trustees (one of whom resided with the plaintiff) on trust for the plaintiff's wife, who lived in the house with her

(*a*) *Branscomb* v. *Bridges*, 1 B. & C. 147; *Holland* v. *Bird*, 10 Bing. 15.

(*b*) Gilb. Distress, by Hunt, 68.

(*c*) *Phillips* v. *Berryman*, 3 Doug. 286.

(*d*) *Smith* v. *Ashforth*, 29 L. J. Ex. 259.

husband; it was held that the enjoyment of the *use* of the goods gave the plaintiff a *special property* in them which entitled him to maintain an action for excessive distress, although he was neither the legal nor the equitable owner (*e*).

Special property.

The person on whom an excessive distress is made must be careful how he enters into any agreement with the distrainor, for an agreement entered into under a duress of goods is not void. So where a defendant pleaded that the plaintiff had wrongfully distrained goods of the value of 20*l.* under colour of a distress for 19*l.* 10*s.*, whereas only 3*l.* 7*s.* 6*d.* was due, and that the plaintiff threatened to sell the goods unless the defendant executed an agreement to pay the 19*l.* 10*s.*, which the defendant accordingly did; it was held that the agreement could not be avoided on such grounds; and, moreover, that the withdrawal of the distress was a good consideration for the agreement (*f*).

Where rent has been reduced.

Where rent has been reduced by payment of land tax or other liabilities attaching to the land (which as we have seen above the landlord ought himself to pay), if the landlord distrains for the whole amount, he will be liable to an action for an excessive distress (*g*).

Measure of damages where loose corn or hay is taken.

Where there has been an excessive distress by taking corn or hay loose under the statute 2 Will. and Mary, sess. 1, c. 5, s. 3, or growing crops under the 11 Geo. II. c. 19, the measure of damages is not the full value of the crops, but the inconvenience which the tenant sustains in being deprived of the control over them, or that which he is put to in procuring sureties to a larger extent in replevying the crops distrained.

(*e*) *Fell* v. *Whittaker*, L. R. 7 Q. B. 120.

(*f*) *Skeate* v. *Beale*, 11 Ad. & Ell. 983; *Gulliver* v. *Cosens*, 1 C. B. 788; *Anscomb* v. *Shore*, 1 Taunt. 261.

(*g*) *Carter* v. *Carter*, 5 Bing. 406.

Part II. Chap. XI.

Piggott v. *Bertles.*

In the case of *Piggott* v. *Bertles* (*h*), Parke, B., says:— "Does the tenant then sustain damage by the act of the distrainor in taking too large a quantity either of corn or hay loose, or growing crops? It seems to us that he does in both cases; in the former he is deprived of the power for a limited time of making use of the corn or hay for his cattle, or disposing of it freely at the market, or he is exposed to the inconvenience of procuring sureties in a replevin bond to a larger amount, if he chooses to replevy and to regain the full dominion over his property. It may be that an additional expense for securing the distress is cast upon him by this unnecessary addition to the chattels distrained, for he must ultimately pay whatever reasonable expense is incurred by the landlord. In the latter case, that of a distress for growing crops, he is deprived of the power of selling and receiving the money to his own use. With regard to all the surplus which the landlord has unreasonably taken, he also will be exposed to additional expense in the keeping of the distress; for the statute 11 Geo. II. c. 19, s. 19, provides that 'if the tenant pay to the landlord before the crops are ripe, cut, and gathered all the rents, costs and charges of making the distress, and which shall have been occasioned thereby, the distress shall cease.' It is therefore that the law contemplates that in a distress of growing crops some other expense will be occasioned to the landlord than that of making the distress; such would be the costs, if the tender were made at a late period, of preparing for or beginning the harvest, which must be greater for the landlord than the tenant, and the costs of looking after the crops to prevent their being damaged by trespassers, or improperly obstructed by the tenant, which would be incurred from the earliest time. These expenses the tenant would ultimately have to pay, and he could not be relieved from the accruing liability to pay them or

(*h*) 1 M. & W. 441.

restored to the full dominion over his growing crops without the inconvenience of replevying and being bound, if he replevies, to give security to double the full value, being a greater amount than he would have done if a proper distress had been taken"(*i*).

Lodger's goods.

A lodger may maintain an action against the wrongdoer if his goods are taken on an excessive distress by the landlord of the party under whom he occupies (*k*).

What must be proved.

In an action for an excessive distress the plaintiff need not prove, as the sum really due for rent, the precise amount stated in his claim; it is sufficient to substantiate that more was distrained for than was actually due (*l*).

It has been decided that it is not sufficent to prove that the warrant of distress was for a greater amount than was due. The plaintiff is not entitled to a verdict unless the goods seized are excessive in regard to the sum really in arrear (*m*). It is not necessary to prove express malice (*n*).

Express malice.

Damages.

So damages for an excessive distress, where the goods have been sold, will depend upon the loss and inconvenience which the plaintiff has been put to by having an unnecessary amount of the goods taken from him. If the amount for which they sold beyond the claim against him has not been returned to him, of course it will form part of the damages (*o*). In order to estimate whether the amount taken was excessive or not, their value must be calculated according to the sum which they would fetch at a broker's sale (*p*), not at the price which could be obtained for them from an incoming tenant in the same line of

Mode of calculating value.

(*i*) *Piggott* v. *Bertles*, 1 M. & W. 441.

(*k*) *Fisher* v. *Algar*, 2 C. & P. 374.

(*l*) *Sells* v. *Hoare*, 1 Bing. 401. For form of statement of claim, see App. A. (19).

(*m*) *Crowder* v. *Self*, 2 M. & Rob. 190.

(*n*) *Field* v. *Mitchell*, 6 Esp. 71.

(*o*) Per Parke, B., 1 M. & W. 448, in *Piggott* v. *Bertles*, *supra*.

(*p*) See *Rapley* v. *Taylor*, 1 C. & E. 150.

Part II. Chap. XI.

business as the plaintiff (*q*); because the former is their value for the purpose of satisfying the defendant's demand.

Where, however, no mention is made in the pleadings of a sale, either as special damage or by way of substantive complaint, damages can only be recovered in respect of the detention up to the time they were sold, and not in respect of the sale itself (*r*).

In a case, in which there had been no sale, and no actual damage was shown to have been sustained, the Court of Exchequer were of opinion that in every case of excessive distress there must be *some loss or inconvenience* for which a jury ought to be told that they must find some damages, either nominal or substantial (*s*).

No action is maintainable for distraining for more rent than is due, provided the distress is not excessive as to that which is due; and an assertion that the distress was made maliciously will not render a count to that effect good (*t*).

Auctioneers.

Where goods are merely seized, although the distress be excessive in quantity, an auctioneer receiving them from the distrainor who returns them is not answerable in trover; although he refuses to deliver them up to the tenant on demand (*u*).

Goods of R. were seized by a landlord under a distress, and delivered to an auctioneer to sell. When the sale was about to begin R. served a notice on the auctioneer that the distress was void, and requiring him not to sell, or if he sold, to retain the proceeds for him. The auctioneer

(*q*) *Wells* v. *Moody*, 7 C. & P. 59. The price realized at the sale is not a conclusive test of the value. See *Smith* v. *Ashforth*, 29 L. J. Ex. 259.

(*r*) *Thompson* v. *Wood*, 4 Q. B. 493.

(*s*) *Chandler* v. *Doulton*, 3 H. & C. 553.

(*t*) *Tancred* v. *Leyland*, 16 Q. B. 669; *Glynn* v. *Thomas*, 11 Ex. 870; *Stevenson* v. *Newnham*, 13 C. B. 285; overruling *Taylor* v. *Henniker*, 12 A. & E. 488; Mayne on Damages, 4th ed. pp. 403, 404.

(*u*) *Whitworth* v. *Smith*, 1 Moo. & Rob. 193.

sold the goods, and refused to pay over the proceeds to the landlord; who thereupon brought an action against him. It was held, that inasmuch as the distress was void, the relationship of landlord and tenant not existing between the parties, the auctioneer was entitled to set up the "*jus tertii*" of R. as an answer to the action (*x*).

Joint actions.

Where in an action for an excessive distress it appeared that of the goods taken part belonged to the plaintiff, and part to a third party, it was held that the plaintiff would be entitled to recover some amount of damages, and that the other party whose goods were taken would also be entitled to maintain an action and recover damages; *semble*, that no joint action for excessive distress could be brought by the plaintiff and a third party (*y*).

Where a broker was employed by a landlord to levy a distress for rent on the goods of the landlord's tenant for 15*l.*, for which he realized 20*l.* 11*s.*, and deducted 6*l.* 1*s.* for expenses and charges of the distress, which was more than is allowed by the statute 57 Geo. III. c. 93, s. 1; and on the tenant's claiming damages from the landlord for the excessive distress, the landlord paid him 6*l.* 1*s.*; it was held that the landlord was entitled to recover from the broker the amount which he (the landlord) had paid to the tenant in satisfaction of the claim for the excessive distress (*z*).

(*x*) *Biddle* v. *Bond*, 6 B. & S. 225.

(*y*) *Bail* v. *Mellor*, 19 L. J. Ex. 279.

(*z*) *Megson* v. *Mapleton*, 49 L. T. N. S. 744.

CHAPTER XII.

PROCEEDINGS IN REPLEVIN.

Our treatise on the law of distress would be incomplete were we not to notice the method by which a tenant is enabled to recover back his goods whenever they have been distrained wrongfully by his landlord. This privilege is conferred upon him by the very ancient action of replevin, which is as old as the law itself, but the proceedings of which have been considerably altered by modern enactments.

Definition of replevin.

The term "replevin" is used in two senses: it either means a re-delivery of the pledge or thing taken in distress to the owner upon his giving security to try the right of the distress, and to restore the thing taken if the right be adjudged against him; or it signifies the particular form of action by which the right of distress is tried (*a*).

At common law.

At common law the proceedings in replevin commenced by the issuing of a writ out of the Court of Chancery giving the sheriff a justicial power, as distinguished from a mere ministerial power (*b*). The sheriff was commanded to *replevy* the goods, that is, to give them back to their owner, and to take sureties from him binding him to try the question of the distrainor's right to take them, and to return the goods if that question were decided against him (*c*). If the sheriff did not do so he would have been guilty of a contempt (*d*). His proper course of proceeding was to issue a precept to his bailiff to recover the goods,

(*a*) Bullen, 243.
(*b*) Gilbert, 60.
(*c*) Sm. L. & T. 3rd ed. 274.
(*d*) 2 Hen. 7, 5 b.

and a summons requiring the defendant to appear at the next County Court to answer the plaintiff for having taken them. The plaintiff then levied his plaint in the County Court, and so proceeded in the action. If the sheriff returned that the goods were "eloigned," or removed, so that he could not find them, the owner might sue out a writ of "*capias in withernam*" requiring the sheriff to take other goods of the distrainor of like nature and value, and to deliver them to the person whose goods had been so eloigned, to be kept until his own should be restored (*e*).

Capias in withernam.

But as it was found extremely inconvenient to send tenants for writs in every case to the Court of Chancery, a more expeditious remedy was given by the Statute of Marlbridge (*f*), which by chapter 21 gave jurisdiction to the sheriffs to entertain actions of replevin in the first instance. And by the statute 1 & 2 Ph. & M. c. 12, s. 3, these powers were also extended to the deputies which the sheriff was thereby permitted to appoint.

Statute of Marlbridge.

1 & 2 Ph. & M. c. 12, s. 3.

The pledges which the sheriff was required to take being merely nominal and quite ineffectual, the statute of Westminster II. (*g*) required them not only to receive of the plaintiffs pledges for the pursuing of the suit before the deliverance of the distress, but also for the return of the beasts, if such return were awarded. And by the statute 11 Geo. II. c. 19, s. 23, the sheriffs, in a case of distress for *rent*, were to take in their own names from the plaintiff and two responsible persons as sureties a *bond* in double the value of the goods distrained, conditioned for prosecuting the suit "*with effect and without delay*," and for duly returning the goods and chattels distrained in case a return was awarded before any deliverance was made of the distress. Such bond was made assignable to the avowant, or person making the cognizance; and if it was

Westminster 2.

11 Geo. 2, c. 19, s. 23.

Sureties.

Prosecuting the suit "with effect and without delay."

(*e*) Gilbert, Replevin, by Impey, 102, 103; Bullen, 246.

(*f*) 52 Hen. 3.

(*g*) 13 Edw. 1, c. 2.

forfeited the avowant might bring an action and recover thereon in his own name (*h*).

If the avowant was successful in his action of replevin, he recovered damages; but if unsuccessful the landlord was enabled to recover his rent and costs (*i*).

The powers and responsibilities of the sheriff, however, with respect to the action of replevin have been taken away by the County Courts Act, 1888 (*k*), and this jurisdiction is now transferred to the registrars of the various County Courts (*l*).

County Courts Act, 1888.

Moreover, the action may now be *commenced* in the High Court, a course which was formerly not available.

Further definition of replevin.

Replevin may, therefore, now be defined as "a remedy for the owner of goods or cattle which have been *wrongfully* taken under a distress, whereby he obtains them back through the registrar of the County Court of the district in which the goods or cattle were taken, *upon giving security to try the validity of the distress or taking* in an action of replevin to be forthwith commenced by him against the distrainor and prosecuted *with effect* and *without delay*, either in the County Court or in the High Court, and to return the goods or cattle, if such return shall be awarded" (*m*).

To what replevin extends.

Replevin has been said not to be confined strictly to distresses, but to extend to all wrongful takings of goods or cattle (*n*). As where a pony, which had been in the

(*h*) Bullen, 250.

(*i*) 17 Car. 2, c. 27.

(*k*) 51 & 52 Vict. c. 43, s. 134, which Act, however, does not come into operation until 1st day of January, 1889. See *Edmonds* v. *Challis*, 7 C. B. 413.

(*l*) The action should be commenced in the court of the lord of any honor or franchise if he has exclusive jurisdiction to grant replevins. *Mounsey* v. *Dawson*, 6 Ad. & Ell. 752. See also *Mortimer* v. *Moore*, 15 L. J. Q. B. 118, 309; *Hellawell* v. *Eastwood*, 6 Ex. 295.

(*m*) Woodfall's L. & T. 12th ed. 464.

(*n*) *Allen* v. *Sharpe*, 2 Ex. 352; *George* v. *Chambers*, 11 M. & W. 149; 7 Jur. 836. At common law the right to replevy was thought so necessarily incident to the liability to a distress, that a clause in

possession of the defendant, was claimed by the plaintiff as his property, but was refused to be given up by the defendant, and the plaintiff thereupon authorised his servant to take the pony from the defendant's stable, and on his doing so he was charged with stealing it; it was held that replevin would lie, Campbell, C. J., remarking, "We are of opinion upon the authority not only of the text books, but of decided cases, that replevin will lie where goods have been wrongfully taken, though not as a distress (*o*).

When replevin lies.

Replevin lay at common law for a wrongful detainer after a lawful distress (*p*). But it has been held now to lie only where goods are unlawfully taken, not where they are simply detained by a party to whom they have been delivered upon a contract (*q*); and there must be a taking of the goods out of the posesssion of the owner. So where F. being in possession of the plaintiff's goods, not as his servant, but as bailee with a special property, delivered them to the defendant with intent to give him a lien against the plaintiff, and the defendant peaceably and *bonâ fide* took possession with this intention, but had no lien and no right to detain the goods as against the plaintiff, and the plaintiff demanded the goods and being refused brought replevin; it was held that there had been no taking sufficient to change the possession, and that though the plaintiff could have recovered in trover or detinue, replevin did not lie (*r*).

a deed granting a rent charge, to the effect that if the rent should be in arrear and a distress made for it, the party distrained upon should not be allowed to replevy, was considered void. Co. Litt. 145 b; Bullen, 244.

(*o*) *Mellor* v. *Leather*, 1 El. & Bl. 619; Gilb. Replevin, 58; Com. Dig. tit. Replevin (A.); Bull. N. P. 58; *Shannon* v. *Shannon*, 1 Sch. & Lef. 324.

(*p*) *Evans* v. *Elliott*, 5 A. & E. 142; *Roberts* v. *Snell*, 1 Man. & G. 577. But it did not lie of deeds relating to the inheritance which went to the heir. In such case detinue was the proper action. *Ibid.* 578.

(*q*) *Galloway* v. *Bird*, 4 Bing. 299.

(*r*) *Mennie* v. *Blake*, 6 El. & Bl. 842.

Part II. Chap. XII.

In practice, however, proceedings in replevin are principally resorted to in cases where there has been an unlawful distress, either for rent or damage feasant (*s*).

Where there has been an unlawful distress.

Where the distress is wholly illegal.

And we may again remark that replevin only lies where the distress is wholly illegal, and not merely irregular or excessive. So it lies where goods exempt by law from distress are seized (*t*), or when no rent whatever was due, or when all arrears had been sufficiently tendered beforehand: for if even the smallest amount of rent is in arrear, so that the distress is not wholly tortious, the injury complained of consisting merely of an excessive seizure, or of some irregularity in the course of proceeding, there is no eventual benefit to be derived from a replevin.

But replevin will not lie where the taking was under a judgment of the High Court (*u*), or under the revenue laws (*x*), or for a crown debt (*y*).

Time for making a replevin.

Where a distress had been taken for rent, and it was intended to replevy the goods and chattels, the replevin was made *within five days next after the distress was taken* and notice thereof duly given; because after that time the distrainor might have had the goods appraised and might sell them under the statute 2 Will. & M. sess. 1, c. 5, s. 2.

There must be a sale.

Nothing, however, but an actual sale could take away the owner's right to replevy; so that the removal of the goods from off the premises after the five days, or an appraisement without any sale, was of no effect, and the replevin might notwithstanding be made at any distance of time until a sale had really taken place (*z*). After a sale the purchaser had a right to take the goods and retain them,

(*s*) *Mennie* v. *Blake*, *supra*.

(*t*) With the exception of animals *feræ naturæ* (Bac. Abr. tit. Replevin (F.)), and perhaps fixtures. *Niblett* v. *Smith*, 4 T. R. 504; Woodfall's L. & T. 12th ed. 464.

(*u*) *George* v. *Chambers*, 11 M. & W. 159.

(*x*) *Cawthorne* v. *Camp*, 1 Aust. 212.

(*y*) *R.* v. *Oliver*, Bunb. 14; Pitt-Lewis' County Ct. Prac. 1st ed. 722.

(*z*) *Griffiths* v. *Stevens*, 1 Chit. Rep. 196.

but until a sale it was competent to the tenant to replevy them (*a*).

In distress damage feasant.

In the case of a distress taken damage feasant, since the distress cannot be disposed of, but only kept as a pledge, there is no particular time within which the replevin should be made; but if the distress, or any part of it, consists of any horse, ass, or other cattle or animal, the rule in this case must at the present day be considered with reference to the power of sale conferred by the statute 17 & 18 Vict. c. 60, s. 1 (*b*).

Extension of time under the Law of Distress Amendment Act, 1888.

By the Law of Distress Amendment Act, 1888 (*c*), this limit of five days has been altered; for by sect. 6 it is enacted that "the period of five days provided in the said Act of William and Mary, chapter five, within which the tenant or owner of goods and chattels distrained may replevy the same, shall be extended to a period of *not more than fifteen* days, if the tenant or such owner make a request in writing in that behalf to the landlord or other person levying the distress, and also give security for any additional costs that may be occasioned by such extension of time. Provided that the landlord or person levying the distress may at the written request, or with the written consent of the tenant or such owner as aforesaid, sell the goods and chattels distrained, or part of them, at any time before the expiration of such extended period as aforesaid (*d*).

Warrant by justices.

Where goods are taken under a warrant issued by a justice to enforce an order of Quarter Sessions for payment of costs of an appeal against a poor rate under the 11 & 12 Vict. c. 43, s. 27, and the 12 & 13 Vict. c. 45, s. 5, in an

(*a*) *Jacob* v. *King*, 5 Taunt. 451.

(*b*) *Ante*, p. 232.

(*c*) 51 & 52 Vict. c. 21, s. 6, which repeals a similar provision under sect. 51 of the Agricultural Holdings (England) Act, 1883.

(*d*) See *Coode* v. *Johns*, 17 Q. B. D. 714; *ante*, pp. 251, 260.

Notice of action.

action where the claim is that "the defendant on the plaintiff's land took the plaintiff's goods and detained them against sureties and pledges;" it was held that such an action is an action of replevin, and that no notice of action under the 1 & 2 Will. IV. c. 41, s. 19, and the 2 & 3 Vict. c. 93, s. 8, or demand of perusal of the warrant under 24 Geo. II. c. 44, s. 6, was necessary (*e*).

What may be replevied.

Whatever may be distrained may be replevied (*f*). So replevin lies for deer in an enclosed ground (*g*), or for the young born since the distress which have been distrained, or for growing crops taken as a distress under the 11 Geo. II. c. 19, s. 8. But it does not lie for money generally (*h*), nor for title deeds (*i*), nor for things affixed to the freehold (*j*).

By whom replevin may be had.

Property in the goods.

The party whose goods have been distrained or unlawfully taken is the proper person to replevy them (*k*). He must have a property absolute or qualified in the goods distrained (*l*). But a special property is sufficient; therefore a person to whom goods are pledged may maintain replevin in respect to them (*m*), or a bailee to whose custody goods have been entrusted (*n*).

Where goods are assigned to trustees.

So where goods were assigned to trustees on trust for the tenant's wife, it was held that the enjoyment of the use of the goods by the tenant gave him a special property

(*e*) *Gay* v. *Matthews*, 4 B. & S. 425; *Fletcher* v. *Wilkins*, 6 East, 283. See also *Jones* v. *Johnson*, 7 Ex. 452.

(*f*) 1 Swanston's Rep. 296; Coop. 414.

(*g*) *Davies* v. *Powell*, Willes, 46.

(*h*) Gilb. Replevin, 156; Sid. 82.

(*i*) Bac. Abr. Replevin (F.); *Roberts* v. *Snell*, 1 Man. & G. 578.

(*j*) *Niblett* v. *Smith*, 4 T. R. 504; Pitt-Lewis' County Ct. Prac. 1st ed. 722.

(*k*) 19 & 20 Vict. c. 108, s. 64.

(*l*) Com. Dig. tit. Pleader (3 K. 1); Co. Litt. 145 b; Bro. Repl. fol. 8, 220; 1 Chit. Pl. 182, 183, 7th ed.; 2 Selw. Nisi Prius, 13th ed. 1150; Com. Dig. Replevin (B.).

(*m*) Pitt-Lewis' County Ct. Prac. 1st ed. 723.

(*n*) Bro. Abr. tit. Replevin, pl. 29; 2 Roll. Abr. 430.

in them, although he was neither the legal nor the equitable owner (*o*).

Joint owners and tenants in common.

Persons jointly interested in a chattel (as joint owners and tenants in common) may maintain an action of replevin in respect thereof, and should all be joined as plaintiffs (*p*). But several persons cannot join in one replevin for several chattels where the property in them is several; for each has a several and particular injury done him, and therefore they cannot jointly complain of an unjust caption and detention (*q*).

Married women.

Formerly, if the goods of a feme sole were taken, and she afterwards married, the husband alone might replevy (*r*), or the husband and wife might join (*s*); if, however, a distress were made after marriage, the husband should have sued alone (*t*). But it is doubtful whether this is the case now since the passing of the Married Women's Property Act, 1882 (*u*).

Executors and administrators.

An executor or administrator may maintain replevin for goods of his testator wrongfully taken in his lifetime, on the principle that the general property lies in him, and the possession ought to follow (*x*).

Against whom replevin may be had.

The defendant in replevin is in the nature of a plaintiff, for he seeks to have a return of the goods replevied (*y*).

(*o*) *Fell* v. *Whittaker*, L. R. 7 Q. B. 120. See also *Fenton* v. *Logan*, 9 Bing. 676.

(*p*) Year Book, 3 Hen. 4, 16 a; Co. Litt. 145 b; Bull. N. P. 53; 1 Chit. Pl. 7th ed. 183; 2 Selw. N. P. 13th ed. 1150.

(*q*) *Ibid.*; and also Gilb. Distress, by Impey, 127.

(*r*) Fitz. N. B. 69 K.; Com. Dig. tit. Replevin (B.); Gilb. Replevin, 156; 2 Selw. N. P. 13th ed. 1150; *Gravenor* v. *Woodhouse*, 2 Bing. 71.

(*s*) *Browne* v. *Mattire*, Cas. temp. Hardw. 119.

(*t*) *Clarke* v. *Davies*, 7 Taunt. 72.

(*u*) 45 & 46 Vict. c. 75.

(*x*) Bro. Abr. tit. Replevin, pl. 59; *Arundel* v. *Trevill*, Sid. 80; Rast. Ent. 560, 561; F. N. B. 69, K.; Gilb. Replevin, by Impey, 139; Bull. N. P. 53; Vin. Abr. tit. Replevin (C.).

(*y*) 1 Wms. Saunders, 640, n. (3).

The replevin will lie either against the bailiff or broker actually making the distress (*z*), and also against the landlord or other person who ordered the taking (*a*), or against both together (*b*). So an action of replevin may be maintained against the magistrate alone who issues the warrant of distress (*c*). It also lies against a person who takes cattle damage feasant, if he detains them after amends tendered (*d*). But a mortgagee in possession is not chargeable as for wilful default in declining to defend an action of replevin brought by the owner of property which was on the premises and seized under a distress for rent levied by the mortgagee (*e*).

Brokers.

We have already mentioned those cases in which the landlord is or is not liable for the acts of his broker; but he should always be made a defendant when the plaintiff intends to pay money into Court (*f*).

The party who brings the action must in all cases use his discretion as to the person whom he proceeds against.

Corporations.

We have seen that corporations may appoint bailiffs to distrain without a warrant under their common seal (*g*); and that a corporation is liable for the tortious act of its agent, though not appointed by seal, if such act be an "ordinary service," as a distress (*h*).

County Courts Act, 1888, as to sheriff's jurisdiction.

We have noticed that the jurisdiction of the sheriff or his deputies with regard to the granting of replevins is

(*z*) Com. Dig. tit. Replevin (C.); Vin. Abr. Replevin (D.).

(*a*) 2 Roll. Abr. 431; Vin. Abr. tit. Replevin (D.).

(*b*) Com. Dig. tit. Pleader (3 K. 1); Gilb. Replevin, 152.

(*c*) *Jones* v. *Johnson*, 7 Exch. 452.

(*d*) Com. Dig. tit. Replevin (C.).

(*e*) *Cocks* v. *Gray*, 1 Giff. 77; 3 Jur. N. S. 1115; 26 L. J. Ch. 607.

(*f*) Woodfall's L. & T. 12th ed. 466.

(*g*) *Ante*, p. 85; Bac. Abr. Corporations (E.) 3, vol. ii. p. 265, ed. 1832; *Carey* v. *Matthews*, mentioned in 1 Salk. 191.

(*h*) *Smith* v. *Birmingham & Staffordshire Gaslight Co.*, 1 Ad. & Ell. 526.

taken away by the County Courts Act, 1888 (*i*). By sect. 134 of that Act, it is provided that "the sheriff shall have no powers and responsibilities with respect to replevin bonds and replevins; but the registrar of the Court of the district *in which any goods subject to replevin shall be taken* shall be empowered, subject to the regulations hereinafter contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the bailiff. Such registrar shall at the instance of the party whose goods shall have been seized, cause the same to be replevied to such party, on his giving one or other of such securities as are mentioned in the next two succeeding sections" (*j*).

Action of replevin in the Superior Court.

Security.

By sect. 135, "Where a replevisor shall wish to commence proceedings in the High Court he shall, at the time of replevying, give security, to be approved of by the registrar in the last preceding section mentioned, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage, or if the goods replevied have been seized otherwise than under colour of distress, the value of the goods, and in either case the probable costs of the action in the High Court, conditioned to commence an action of replevin against the seizor in the High Court *within one week* from the date thereof, *and to prosecute such action with effect and without delay:* and unless judgment thereon be obtained by default, to prove before the High Court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, the rent or value whereof exceeded 20*l.* by the year, or to some toll, market, fair, or franchise was in question, *or that such rent or damage, or the value of the goods seized, exceeded twenty pounds*, and to make return of the goods, if a return thereof shall be adjudged" (*k*).

Prosecute "with effect and without delay."

(*i*) 51 & 52 Vict. c. 43, s. 134, which consolidates the County Courts Act, 1856, s. 63.

(*j*) See Appendix B. (2), (8), (13).

(*k*) For form of bond and of memorandum of deposit in lieu of bond, see Appendix B. (4) and (5).

Part II. Chap. XII.

As to security to cover the damage or expenses.

By sect. 136, "If a replevisor shall wish to commence proceedings in a County Court, he shall, at the time of replevying, give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, or if the goods replevied have been seized otherwise than under colour of distress, the value of the goods, and in either case the probable costs of the action, conditioned to commence an action of replevin against the seizor in the court of the district in which the goods shall have been seized, *within one month* from the date of the security, and to prosecute such action with effect and without delay, and to make a return of the goods, if a return thereof shall be adjudged" (*l*).

Certiorari.

By sect. 137, "Any action of replevin brought in the Court shall be removed into the High Court by writ of certiorari, if the defendant shall apply to the High Court, or to a judge thereof for such writ, and shall give security, to be approved of by a master of the Supreme Court, for such amount, not exceeding one hundred and fifty pounds, as such master shall think fit, conditioned to defend such action with effect; and unless the replevisor shall discontinue, or shall not prosecute such action, or shall become nonsuit therein, to prove before the High Court that the defendant had good ground for believing either that the title to some corporeal or incorporeal hereditament, the rent or value whereof exceeded 20*l.* by the year, or to some toll, market, fair, or franchise was in question, or that the rent or damage in respect of which the distress shall have been taken or the value of the goods seized exceeded *twenty pounds.*"

At whose cost

By sect. 108, "Where a party is required to give secu-

(*l*) For form of bond and of memorandum of deposit in lieu of bond, see Appendix B. (6) and (7).

rity, such security shall be at the cost of the party giving it, and in the form of a bond (*m*) with sureties, to the other party, or intended party, in the action or matter: Provided always, that the Court in which any action on the bond shall be brought may by order give such relief to the obligors as may be just, and such order shall have the effect of a defeasance of such bond."

Security shall be.

By sect. 109, "Where a party is required to give security, he may in lieu thereof deposit with the registrar, if the security is required to be given in the Court, or with a master of the Supreme Court, if the security is required to be given in the High Court, a sum equal in amount to the sum for which he would be required to give security, *together with a memorandum* (*n*), to be approved of by such registrar or master, and to be signed by such party, his solicitor, or agent, setting forth the conditions on which such money is deposited, and the registrar or master shall give to the party paying a written acknowledgment of such payment; and the judge of the County Court, when the money shall have been deposited in such Court, or a judge of the High Court, when the money shall have been deposited in the High Court, may, on the same evidence as would be required to enforce or avoid such bond, as in the last preceding section is mentioned, order such sum so deposited to be paid out to such party or parties as he shall think just."

Deposit in lieu of security.

It may here be stated that by sect. 22 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), the provisions of the County Courts Act, 1856, which relate to replevin, shall be deemed and taken to apply to all cases of replevin of goods distrained for rent or damage feasant. This Act with the other Acts relating to County Courts is

Common Law Procedure Act, 1860, s. 22.

(*m*) For form of bond, see App. B. (6).

(*n*) See form, Appendix B. (7).

consolidated by the County Courts Act, 1888 (51 & 52 Vict. c. 43).

As to the bond.

It seems that a bond of the kind mentioned in sect. 108 may be entered into by a joint-stock company, or even by an infant, with sufficient sureties, and that the registrar cannot refuse to receive such bond, on the ground that the principal obligor is disqualified to execute it; for otherwise the parties would lose the benefit of the statute, and be thereby deprived of the right to replevy (*o*).

County Court Rules, 1889, as to giving security.

The mode of giving the security is prescribed by Order XXIX. of the County Court Rules of 1889, which is as follows:—

Notice.

"In all cases where a party proposes to give a bond by way of security, he shall serve, by post or otherwise, on the opposite party and upon the registrar, at his office, notice of the proposed sureties according to the form in the Appendix (*p*). And the registrar shall forthwith give notice to both parties of the day and hour on which he proposes that the bond shall be executed, and shall state in the notice to the obligee that any valid objection which he may have to make to the sureties, or either of them, must be made on such day." Ord. XXIX. r. 1 (*q*).

Affidavit of sureties.

"The sureties shall make an affidavit of their sufficiency according to the form in the Appendix (*r*), unless the opposite party shall dispense with such affidavit." Ord. XXIX. r. 2.

As to the bond.

"The bond shall be executed in the presence of the judge or registrar, or of a commissioner to administer oaths, or of the clerk to the registrar authorized to take affidavits." Ord. XXIX. r. 3.

(*o*) *Young* v. *Brompton, Chatham & Gillingham Water Works Co.*, 1 B. & S. 675; Woodfall's L. & T. 12th ed. 469.

(*p*) For forms, see Appendix B. (1).

(*q*) For forms, see Appendix B. (2) and (8).

(*r*) For form, see Appendix B. (3).

"Where a party makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party, by post or otherwise, of such deposit having been made." Ord. XXIX. r. 4.

Notice on deposit of money in lieu of bond.

"In all cases where the security is by bond, the bond shall be given to the party or persons requiring the security, and shall be deposited with the registrar until the action is finally disposed of." Ord XXIX. r. 5.

Where deposit shall be made.

"No registrar, deputy-registrar, registrar's clerk, high bailiff, bailiff, broker, or other officer of the Court, shall become surety in any case where, by the practice of the Court, security is required." Ord. XXIX. r. 6.

Who cannot be sureties.

The sureties should be two freeholders or housekeepers (*s*).

Liability of sheriff.

Formerly, the sheriff was liable to an action if he took insufficient sureties in a replevin; but he was only bound to exercise a reasonable discretion in deciding upon their sufficiency, and it was for the jury to decide whether he had used such discretion or not (*t*). He was not bound to *warrant* the sufficiency of the sureties (*u*); and it seems now that the registrar, who stands in the place of the sheriff, is not liable if he takes insufficient sureties (*v*). It is incumbent upon him to exercise proper and reasonable discretion, but he is not called upon to examine further (*x*).

(*s*) Woodfall's L. & T. 12th ed. 470.

(*t*) *Jeffery* v. *Bastard*, 4 Ad. & Ell. 823; *Concanen* v. *Lethbridge*, 2 H. Bl. 40; *Twells* v. *Colville*, 2 Willes, 375; *Plumer* v. *Brisco*, 11 Q. B. 46; *Evans* v. *Brander*, 2 H. Bl. 547; *Page* v. *Eamer*, 1 Bos. & Pul. 378; *Barnes* v. *Lucas*, Ry. & Moo. 264; *Paul* v. *Goodlake*, 2 Bing. N. C. 220.

(*u*) *Hindle* v. *Blades*, 5 Taunt. 224; *Austen* v. *Hayward*, 7 Taunt. 327.

(*v*) Pollock & Nicol C. C. Practice, 8th ed. p. 21.

(*x*) *Young* v. *Brompton, Chatham & Gillingham Waterworks Co.*, 31 L. J. Q. B. 14.

Objection to sufficiency of sureties.

If the opposite party wishes to object to the sufficiency of the sureties, he must attend and state his objections as provided by rule 1 of Order XXIX., which we have mentioned above.

We will remind our readers here that a County Court, with reference to the above enactments and rules, has jurisdiction in *all* actions of replevin, even though a question of title to a corporeal or incorporeal hereditament arises, and whatever may be the amount of rent or damage claimed (*y*). Sometimes there is an exclusive franchise of granting replevins independently of these enactments, in which case the action should be brought in the court of the lord of the honor or franchise who has such exclusive jurisdiction (*z*).

On what the amount of the security depends.

The amount of the security, whether by bond or deposit, does not depend upon the value of the cattle or goods to be replevied, but upon the amount of the alleged rent or damage and the probable costs of the cause in the High Court or in the County Court, as the case may be.

County Court fees.

The fees payable at the County Court on making a replevy are as follows (*a*) :

	£	*s.*	*d.*
For a warrant to replevy . . .	0	2	6
For a replevin bond or deposit, where the alleged rent or damage does not exceed 20*l.*	0	10	6
For a replevin bond or deposit, where the alleged rent or damage exceeds 20*l.* .	1	1	0

(*y*) *Fordham* v. *Akers*, 4 B. & S. 578; *Reg.* v. *Raines*, 1 El. & Bl. 855; *Reg.* v. *Gurdon*, 12 W. R. 201.

(*z*) *Hellawell* v. *Eastwood*, 6 Ex. 295; *Edmonds* v. *Challis*, 7 C. B. 413; *Mounsey* v. *Dawson*, 6 Ad. & Ell. 752 (where the lord of a manor had prescriptive rights to grant replevins in the manor).

(*a*) County Court Rules, 1889; Treasury Order, Schedules A. and B., 1st January, 1889.

	£	s.	d.
For notice to distrainor . . .	0	2	6
For delivering the goods on completion of a replevin bond . . .	1	1	0
Together with 6*d.* per mile from the court house to the place where the goods are.			
For making a return of certiorari for costs out of pocket	0	15	0
The fees payable in an action of replevin in the County Court are the same as those in other actions.			
In replevins all poundage except as aforesaid shall be estimated on the amount of the alleged rent or damage, to be fixed by the registrar.			
In every case where the poundage cannot be estimated by any rule in this schedule, it shall be estimated on 20*l.*			
All fractions of a pound for the purpose of calculating poundage shall be treated as an entire pound.			

Meaning of prosecution of action "with effect and without delay."

Before proceeding to discuss the actions of replevin in the County Court we will explain the meaning of the condition in the securities that the action shall be prosecuted "*with effect and without delay.*"

As regards the meaning of the term "with effect," it has been held that the plaintiff must not only proceed to a decision of the suit, but must prosecute it to a not unsuccessful termination (*b*).

And if the cause is removed from the County Court by the defendant, he is bound, so far as in him lies, to carry the suit to a successful termination, and the bond is forfeited if the obligor does not succeed in the suit (*c*).

(*b*) *Jackson* v. *Hanson*, 8 M. & W. 477.

(*c*) *Tummons* v. *Ogle*, 6 El. & Bl. 571; *Brackenbury* v.

If the plaintiff in replevin is nonsuited, he has not prosecuted it "with effect" (*d*).

Where a replevin bond was conditioned that the distrainee should appear at the next County Court and prosecute his suit "with effect," and he did so appear, and levied his plaint, which was afterwards at the instance of the distrainee removed into the Common Pleas by the old writ of "*re. fa. lo.*," but before the writ was returnable he died; it was held that he had prosecuted "with effect," and had not committed a breach of the condition, Denman, C. J., remarking, that "he took the proper steps to try his right, but was interrupted by death; and the act of God cannot place the sureties in a worse position" (*e*).

But where the breach assigned is that the plaintiff in replevin did not prosecute his suit "with effect," it is a sufficient answer to show that that suit is still pending; but it is no answer where the breach also is that he did not prosecute without delay (*f*).

With regard to prosecuting "without delay," this condition in the bond may be broken by a delay which does not exceed the time for proceedings allowed by the practice of the Courts, if the defendant in replevin is unduly prejudiced by such delay; and the reason of this seems to be that if the action is pending for any long time, there is danger that the value of the distress, or the solvency of the sureties to the replevin bond, may be affected by the delay. The plaintiff in such an action is obliged to go on with the proceedings, just as an attorney would be who had contracted to use due diligence (*g*).

Allowing two years to elapse without proceeding has

Pell, 12 East, 587; *Perreau* v. *Bevan*, 5 B. & C. 301; *Morgan* v. *Griffith*, 7 Mod. 380; *Gwillim* v. *Holbrook*, 1 Bos. & Pul. 410.

(*d*) *Turner* v. *Turner*, 2 B. & B. 111.

(*e*) *Morris* v. *Matthews*, 2 Q. B. 293.

(*f*) *Harrison* v. *Wardle*, 5 B. & Ad. 153; *Ryder* v. *Edwards*, 3 Man. & G. 202.

(*g*) *Gent* v. *Cutts*, 11 Q. B. 288.

been held to be a breach of the condition to prosecute without delay (*h*).

County Court action of replevin.

Formerly the old common law County Court had jurisdiction to entertain actions of replevin, however considerable the value of the goods might be (*i*); and this power was vested in the County Court by sect. 119 of the County Courts Act, 1846 (*k*).

We have already seen that all actions of replevin, without any exception, may be commenced and prosecuted to final judgment and execution in the County Court of the district within which the distress was taken, whatever may be the amount of rent or damage claimed, and notwithstanding the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise is in question (*l*). But if successful in the County Court, the party can only recover costs as in an action for less than 5*l*., however important or difficult may be the question involved, and notwithstanding the distress was taken for more than 20*l*. (*m*).

As to the plaint.

By sect. 133 of the County Courts Act, 1888 (*n*), all actions of replevin which shall be brought in the Court, shall be brought by *plaint*, and in every such action the plaint shall be entered in the Court of the district where the goods were seized. The plaint is entered in the same way as in other County Court cases (*o*).

51 & 52 Vict. c. 43, s. 136.

By 51 & 52 Vict. c. 43, s. 136, the action must be brought *within one* (*calendar*) *month* from the date of the

(*h*) *Axford* v. *Perrett*, 5 Bing. 586.

(*i*) 25 Hen. 3, c. 21; Year Book, 2 Hen. 7, 5, 6; 2 Inst. 139.

(*k*) This section, however, is repealed by the County Courts Act, 1888.

(*l*) *Reg.* v. *Gurdon*, 12 W. R. 201; *Reg.* v. *Raines*, 1 E. & B. 855; *Fordham* v. *Akers*, 4 B. & S. 578. Unless there be an exclusive right to grant replevins in a particular Court by reason of some franchise, &c.

(*m*) *Pease* v. *Chaytor*, 3 B. & S. 634.

(*n*) 51 & 52 Vict. c. 43.

(*o*) See County Court Rules, 1889, Ord. V., rr. 1, 2.

Part II. Chap. XII.

security (whether by bond or memorandum of deposit), and must be prosecuted "with effect and without delay."

County Court Rules, 1889.

By the County Court Rules of 1889, Order XXXIV., provision is made for the regulation of actions of replevin.

Joinder of action.

By rule 1, "In actions of replevin no other cause of action shall be joined in the summons"(*o*).

Particulars.

By rule 2, "On entering a plaint in replevin the plaintiff must specify and describe in a statement of particulars the cattle, or the several goods and chattels taken, and the distress or other taking of which he complains"(*p*).

It is not usual or proper to insert in the particulars the price of the cattle or goods taken; for the plaintiff, if he succeeds, is not entitled to recover their value, but only damages for their unlawful taking and detention (*q*).

Summons.

Upon the plaint being entered a summons issues in the usual form with particulars annexed, and a copy is served on the defendant by the bailiff in like manner as in other actions (*r*).

As to the trial.

The preparations for the trial are the same as in other cases, consisting chiefly in the summoning of witnesses, and the giving of notices to produce and admit.

A jury may be obtained in an action of replevin, provisions for this having been expressly made by Order XXII. rule 3.

Summary procedure.

By the County Court Rules, 1889, Order XXXIV. rule 3, "All actions of replevin in cases of distress for rent in arrear, or for damage feasant, shall be tried in a summary way as other actions in the Courts holden under the authority of the County Courts Act, 1846 (*s*), and the judgment therein, in ordinary cases, whether for plaintiff or

(*o*) *Mungeau* v. *Wheatley*, 6 Exch. 88.

(*p*) For form, see App. B. (9). None is provided by the rules.

(*q*) 2 Wms. Saund. 726, note (1); Pitt-Lewis' C. C. Prac. 1st ed. 730.

(*r*) Pollock & Nicol, C. C. Prac. 8th ed. 205.

(*s*) See County Courts Act, 1888, which repeals the above Act.

defendant, shall be, unless otherwise ordered, according to the forms in the Appendix "(*t*).

Evidence for the plaintiff.

The plaintiff must prove *the taking* of which he complains, this being the foundation of the action, and that the defendant was the person who took it or caused it to be taken (*u*).

He must also prove that the goods were taken within the district and jurisdiction of the Court mentioned in the plaint (*v*); and that the goods so taken were his, *i.e.*, that at the time of the taking he had an absolute or qualified property in them (*x*).

If the goods are taken under a distress for rent, he may plead the several matters which we have already described, showing that such distress was wrongful; as, for instance, that there was no actual demise at a fixed rent, or that no rent was due. Where a plaintiff claims a right of common in respect of distinct lands, the jury must have sufficient evidence before them to enable them to say in respect of which lands the right of common exists (*y*).

Evidence for the defendant.

The defendant, unless he denies the taking altogether, must be able to prove that he is entitled to a return of the goods replevied (*z*).

Special or consequential damages sustained by the plaintiff, in consequence of the goods replevied, may be awarded by the jury to the plaintiff. But he must recover them in his action of replevin; for judgment in replevin is a bar to an action in respect of trespass to the goods.

(*t*) For forms, see Appendix B. (14) and (15).

(*u*) *Galloway* v. *Bird*, 12 Moore, 547. See also *Potter* v. *North*, 1 Wms. Saund. 635; *Evans* v. *Elliott*, 5 Ad. & Ell. 142.

(*v*) *Potter* v. *North, supra; Potten* v. *Bradley*, 2 Moo. & Payne, 78.

(*x*) *Ante*, p. 348. And see *Fell* v. *Whittaker*, L. R. 7 Q. B. 120.

(*y*) *Newby* v. *Singleton*, 1 L. J. K. B. 165.

(*z*) *Goodman* v. *Ayling*, Yelv. 148; *Matthews* v. *Carey*, 1 Salk. 107; 1 Wms. Saund. 640; Pitt-Lewis' C. C. Prac. 1st ed. 732. See also Woodfall's L. & T. 12th ed. 475.

Damages cannot be awarded in respect of a trespass to land committed in the taking of the goods replevied (*a*).

It is sufficient if the defendant proves a legal right to distrain for any cause whatever, either on his own behalf, or as the bailiff or agent of any other person (*b*).

The amount of rent in arrear and the value of the goods distrained should also be proved (*c*).

Judgment.

The judgment in replevin in ordinary cases is in the usual form as in other actions. If the verdict or judgment be for the plaintiff, it is not for the value of the goods, but simply for the plaintiff with damages for the illegal distress. If for the defendant, then where the taking was by way of distress for rent or other debt, the value of the goods distrained must, if the defendant require, also be found. Whilst if the distress was for *damage feasant*, the amount of damage sustained by the defendant must, if the plaintiff so require, be similarly found (*d*). This is provided by the County Court Rules, 1889, by which, "Where the distress is for rent, or for any other claim for which a distress may be lawfully taken, and the defendant succeeds in the action, if the defendant shall so require, the Court shall, if the action is tried without a jury, and the jury shall, if the action is tried with a jury, find the value of the goods distrained, and if the value is less than the amount of rent or otherwise of money in arrear, judgment shall be given for the amount of such value, but if the amount of the rent or such other sum of money in arrear be less than the value

County Court Rules, 1889.

(*a*) *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; *Pease* v. *Chaytor*, 3 B. & S. 620.

(*b*) *Whitehead* v. *Taylor*, 10 A. & E. 210; *Trent* v. *Hunt*, 9 Exch. 14; *Trevillian* v. *Pine*, 11 Mod. 112; 1 Wms. Saund. 347, note (*d*); *Snell* v. *Finch*, 13 C. B. N. S. 651; *Reece* v. *Strousberg*, 54 L. T. N. S. 133; *Dean of Christ Church, Oxford* v. *Duke of Buckingham*, 33 L. J. C. P. 322.

(*c*) *Sheape* v. *Culpepper*, 1 Lev. 255.

(*d*) Pitt-Lewis' C. C. Prac. 1st ed. 732.

so found, judgment shall be given for the amount of such rent or other sum of money, and may be enforced in the same manner as any other judgment of the Court." Ord. XXXIV. r. 4 (*e*).

In case of damage feasant.

"Where the distress is for damage feasant, and the defendant is entitled to judgment for a return, if the plaintiff shall so require, the Court shall, if the action is tried without a jury, and the jury shall, if the action is tried with a jury, find the amount of the damage sustained by the defendant, and judgment shall then be given in favour of the defendant, in the alternative, for a return, or for the amount of the damage so found." Ord. XXXIV. r. 5 (*f*).

Where the distress is for damage feasant.

In cases other than those of distress the following rule is applicable:—

In cases other than those of distress.

"In all cases of replevin, other than those arising out of a seizure by way of distress where the defendant justifies the taking and proves his case, the judgment for the defendant shall be for a return of the goods, with or without costs." Ord. XXXIV. r. 6.

In default of any direction on the subject, the successful party is entitled to his costs, and it is provided by the County Court Rules, 1889, that "costs in actions of replevin may, where the fees of Court are paid on 5*l.* or upwards, be allowed to solicitors, upon the higher scale in the Appendix applicable to actions where the amount claimed exceeds 20*l.*, if the judge shall so order" (*g*).

Costs.

In actions of replevin the County Court possesses the same general power of granting a new trial as in other cases.

New trial.

An action of replevin often involves a question of right,

Question of right.

(*e*) For forms, see App. B. (15).

(*f*) For form, see App. B. (16).

(*g*) Ord. L. r. 19. See App. to the rules.

Part II. Chap. XII.

and a new trial may be granted, although the verdict be for a small amount; for the rule in the High Court that a new trial will not be granted if the damages recovered are less than 20*l.* does not apply to actions of replevin (*h*).

Appeal.

An appeal from the decision of the County Court is allowed in actions of replevin where the amount of rent or damage exceeds 20*l.*, subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior Courts to the High Court (*i*).

If the parties before decision given agree in writing not to appeal, they can do so (*k*).

The practice in regard to appeals in cases of replevin is the same as in ordinary cases (*l*).

Actions of replevin commenced in the High Court.

Time for commencing.

We have already set out sect. 135 of the statute 51 & 52 Vict. c. 43 (*m*), by which an action of replevin may be commenced in any one of the Superior Courts of law in the form applicable to personal actions therein. The action must be commenced *within one week from the date of the replevin bond*, and it must be prosecuted "without delay and with effect," or the bond will be forfeited.

Indorsement of writ of summons.

It is commenced by writ of summons, which is indorsed as follows:—"The plaintiff's claim is in replevin for goods wrongfully distrained" (*n*).

Common Law Procedure Act, 1852.

The Common Law Procedure Act, 1852, s. 41, authorized the joinder of any causes of action in one action, except replevin and ejectment; but now, by the Rules of

(*h*) *Edgson* v. *Cardwell*, L. R. 8 C. P. 647.

(*i*) 51 & 52 Vict. c. 43, s. 120. See *Norris* v. *Carrington*, 16 C. B. N. S. 10, as to security for costs.

(*k*) 51 & 52 Vict. c. 43, s. 123.

(*l*) See Mr. Pitt-Lewis' treatise on County Court Practice, pp. 541 *et seq.* See also pp. 722—734, from which several of the above remarks and authorities are taken.

(*m*) *Ante*, p. 351.

(*n*) R. S. C. App. A. Pt. III. s. 4.

the Supreme Court, Ord. XVIII. r. 1, "the plaintiff may unite in the same action several causes of action; but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or a judge may order separate trials of any such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof" (*o*).

Damages.

The only damages recoverable in this action are the expenses to which the plaintiff has been put to replevy his goods.

At common law.

No damages were recoverable at the common law in an action of replevin or second deliverance, and in case of a verdict for the defendant, or of the plaintiff's being nonsuited, the judgment at common law was merely for a return of the goods (*p*).

By the combined effect of the statutes 7 Hen. VIII. c. 4, s. 3, and 21 Hen. VIII. c. 19, s. 3, a person making avowry or cognizance, or justifying as bailiff, if the avowry, &c. was found for him, or the plaintiff was nonsuited or otherwise barred, recovered his damages and costs. By 17 Car. II. c. 7, s. 2, in replevin for arrears of rent, provision was made, upon a suggestion of the defendant in the case of a nonsuit before issue joined, or of a judgment for the defendant on demurrer, for the issue of a writ of inquiry upon the return of which defendant had judgment to recover the arrears of rent, if the goods, &c. amounted to that sum; and, if not, then the value of such goods, &c., with his full costs of suit (*q*). But these statutes are repealed; still there is no doubt that, by proper claim or counterclaim, a

(*o*) For form of statement of claim, see Appendix B. (25).

(*p*) Chit. Forms, 7th ed. 584.

(*q*) This means ordinary costs as between party and party, and not costs as between solicitor and client, *Jamieson* v. *Trevylyan*, 10 Ex. 748.

Part II. Chap. XII.

defendant can now recover any damages to which he may be entitled (*r*).

Defences: Avowry and cognizance.

Before the Judicature Acts, if the defendant contended that the goods were taken by him in his own right, his pleading was called an "avowry"; if in the right of another, as when the defendant was bailiff or agent of the person having the right, it was called a "cognizance." The plaintiff's next pleading was called a "plea in bar," and the defendant's pleading to such plea a "replication." These technical terms no longer exist, though they are still frequently used for the sake of convenience (*s*).

Payment into Court.

Money may be paid into Court in an action of replevin in the same way as in other actions. And it may be paid in as to part of the goods taken, and a justification made as to the rest (*t*). Such payment into Court will not, nor will the acceptance thereof by the defendant in satisfaction, cause a forfeiture of the replevin bond (*u*).

Discontinuance of action.

The plaintiff may discontinue the action as in other cases, but he will thereby forfeit his bond or other security conditioned to prosecute the action "with effect and without delay." The defendant, however, cannot discontinue (*x*).

Nonsuit.

The plaintiff may be nonsuited as in other actions, and in this case the defendant has a return of the goods or cattle with costs. And the defendant may now by counterclaim recover not only the goods or cattle, but also damages and costs. The jury were also by 17 Car. II. c. 7, s. 2, empowered to inquire into the arrears of rent in an action

(*r*) Mayne on Damages, 4th ed. 401.

(*s*) The former law with regard to avowries and cognizances is stated at length in the 12th edition of Woodfall's Landlord and Tenant by Lely, pp. 481—484. For forms of avowry and cognizance, see App. B. (26), (27), (28), and (29).

(*t*) *Lambert* v. *Hepworth*, 2 Q. B. 729. See County Court Rules, 1889, Ord. IX. r. 18.

(*u*) C. L. P. Act, 1860, ss. 23, 24.

(*x*) *Long* v. *Buckeridge*, 1 Stra. 112; *Hodgkinson* v. *Snibson*, 3 Bos. & Pul. 603.

of replevin, and the value of the cattle or goods distrained, if required by the defendant (*y*).

Damages.

If a verdict is found for the plaintiff, the jury assess the damages as in an ordinary action of trespass. Unless special damage is laid they are generally only costs of the replevin bond; and before the statute 19 & 20 Vict. c. 108, were always assessed at 2*l.* 2*s.* in London, Middlesex, and York, and in some other places, and 2*l.* 10*s.* elsewhere (*z*). They now depend upon the amount distrained for.

These are all he is entitled to, as he has already recovered possession of the goods distrained (*a*).

If the goods or cattle have not been delivered to the plaintiff he is entitled to recover their value with costs, and expenses of the replevy, and also damages for their detention (*b*).

Special damages arising from an injury to the goods may now be awarded in replevin (*c*).

Execution.

The execution for the plaintiff is the same as in other actions, namely, by *fi. fa.*, or elegit (*d*).

Writ "*De retorno habendo.*"

Before the Judicature Acts if the defendant had judgment at common law he had execution by a writ of "*de retorno habendo*" for a return of the goods or cattle distrained, and a *fi. fa.* for his damages and costs (*e*). There was also a proceeding called "*capias in withernam*," which we have mentioned before (*f*). But now the jury will probably always find the value of the goods, and the judgment, if for the defendant on his counter-claim, will be

"*Capias in withernam.*"

(*y*) Woodfall's L. & T. 12th ed. 486. But see 44 & 45 Vict. c. 59, s. 3.

(*z*) Mayne on Damages, 4th ed. 401.

(*a*) Mayne on Damages, *supra*.

(*b*) 2 Chit. Arch. 1082, 11th ed.

(*c*) *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.

(*d*) Arch. Prac. by Prentice, 13th ed. 898.

(*e*) *Ibid.*

(*f*) *Ante*, p. 343.

the same as that for the plaintiff in an ordinary action for detention of goods.

Removal by certiorari from County Court into High Court.

An action of replevin may be removed into the High Court of Justice at the instance of the defendant by a writ of *certiorari* by leave of the Court or a judge (*g*).

Application for the writ.

The object of the statute being to avoid heavy costs, the application for the writ should be to a judge at chambers, and not to the Court. If the judge thinks there is any difficulty in the case, he can send the matter to the Court (*h*).

Affidavit to support application.

The application should be supported by an affidavit, which should be entitled in the same way as affidavits in the High Court, but not in any matter or cause. It should state sufficient facts to induce the Court or judge to grant the *certiorari*. As we have seen, if such are the facts, it should particularly state that the defendant has good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise is in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l*. (*i*).

Effect of the 51 & 52 Vict. c. 43, s. 129.

The *certiorari* might sometimes be obtained on an *ex parte* application. Sometimes only a rule *nisi* will be granted or summons to show cause. By the 51 & 52 Vict. c. 43, s. 129, the Court or a judge may direct that a rule or summons shall operate as a stay of proceedings. But the Court will not stay proceedings in an action of replevin unless upon payment of the rent in arrear together with all costs, though the arrears were tendered before replevin with costs up to that time (*k*).

(*g*) 51 & 52 Vict. c. 43, s. 137, *ante*, p. 352. And see County Court Rules, 1889, Order XXXIII. As to irregular proceedings in removing such replevin, see *Stansfield* v. *Hellawell*, 7 Ex. 373.

(*h*) *Bowen* v. *Evans*, 3 Exch. 111.

(*i*) For forms, see App. B. (17) to (24) inclusive.

(*k*) *Hopkins* v. *Shrole*, 1 Bos. & Pul. 382.

Stay of proceedings.

By this section it is provided that "the grant by the High Court, or by any judge thereof, of an order or summons to show cause why a writ of *certiorari* should not issue to any Court shall, if the High Court, or a judge thereof, so direct, operate as a stay of proceedings in the action or matter to which the same shall relate, until the determination of an order or summons, or until such High Court or judge thereof shall otherwise order; and the judge shall from time to time adjourn the trial of such action or matter to such day as he shall think fit, until such determination, or until such order be made; but if a copy of such order or summons shall not be served by the party who obtained it on the opposite party, and on the registrar *two clear days* before the day fixed for the trial of the action or matter, the judge may, in his discretion, order the party who obtained the order or summons to pay all the costs of the day, or so much thereof as he may think fit, unless the High Court, or a judge thereof, shall have made some order respecting such costs."

Certiorari.

And by sect. 130:—"Where a writ of certiorari to a Court shall have been granted by the High Court, or a judge thereof, on an *ex parte* application, and the party who obtained it shall not lodge it with the registrar, and give notice to the opposite party that it has issued *two clear days* before the day fixed for the trial of the action or matter to which it shall relate, the judge may, in his discretion, order the party who obtained the writ to pay all the costs of the day, or so much thereof as he shall think fit, unless the High Court, or a judge thereof, shall have made some order respecting such costs."

Refusal to grant certiorari.

By sect. 132:—"When the High Court, or a judge thereof, shall have refused to grant a writ of certiorari to a Court, or any such order as mentioned, no other Court or judge shall grant such writ or order; but nothing herein shall affect the right of appealing from the decision of the judge of the High Court to the High Court itself,

or prevent a second application being made for such writ or order to the High Court, or a judge thereof, on grounds different from those on which the first application was founded."

The hearing of the summons or rule nisi is the same as in ordinary cases, and when an order or rule absolute has been obtained, the writ of certiorari may be issued (*l*).

Security.

The defendant must give security, to be approved of by the master, for such amount, not exceeding 150*l*., as he shall think fit, conditioned as pointed out by the 137th section of the above Act (*m*).

Bond and deposit.

The security is in the form of a bond with two sureties to the plaintiff; or, instead of giving a bond, a deposit in money may be made, as appears by sect. 109 of the above Act (*n*). The defendant should then enter an appearance in the High Court in the usual manner, and give the usual notice to the plaintiff or his attorney. If he do not enter an appearance the best method is to obtain an order at Chambers for that purpose. The subsequent proceedings are in all respects similar to those where the action is commenced in the High Court.

Writ of recaption.

We must now shortly speak of a particular species of wrongful distress for which a special form and remedy is provided; that is to say, the distraining a second time for the same rent the same goods or cattle, they having been replevied and restored to the owner, and the action of replevin being still pending (*o*). For this injury the owner of the things so taken, whether the tenant or a stranger, may have a *writ of recaption*, in which, if the defendant is convicted, he will be fined to the Crown; because by the second caption the defendant takes upon himself to determine the legality of the first whilst that

(*l*) Woodfall's L. & T. 12th ed. 492.
(*m*) For which see *ante*, pp. 351, 352.
(*n*) *Ante*, p. 353.
(*o*) Bullen, 185.

very point is under the consideration of the Court in which the replevin is depending. For if the distress were lawful in the first instance he would have a return of it by law; and, therefore, the second taking is unreasonable; and if the first were unlawful, much more so is the second, being for the same cause; so that the recaption lies even where the cause of the first caption is just (*p*).

But if the cattle of two different persons are at separate times distrained for the same rent, the owner of the second distress cannot have this writ, because his cattle have not been twice taken. It seems, however, that it lies even where different cattle of the same tenant are taken for the same cause as the former distress (*q*).

Damages.

The damages to be recovered are not for taking or detaining the plaintiff's cattle or goods, but only damages for the defendant's contempt against the law (*r*).

Writ of second deliverance and return irreplevisable.

As we have seen, where the defendant had judgment for the return of the goods, a writ "*de retorno habendo*" issued in his favour, whereby the goods were returned again into his custody, to be sold or otherwise disposed of as if no replevin had been made; and when the judgment was by the default or nonsuit of the plaintiff, he might at the common law have brought another replevin, and so on "*ad infinitum*, to the intolerable vexation of the defendant;" whereupon the statute of Westminster II. (13 Edw. I. c. 2) restrained the plaintiff, when nonsuited, from suing out any fresh replevin; allowing him a *judicial* writ, issuing out of the original record, called a writ of "*second deliverance*" (*s*): in order that he might have the same

(*p*) Gilb. Replevin, by Impey, 224; Fitz. N. B. 71 (E.); Brad. 263; Bullen, 185.

(*q*) F. N. B. 71; Bullen, 185.

(*r*) 1 Roll. 320, 10; 5 Com. Dig. (3 K.), 32, 305; Bullen, 186.

(*s*) This writ issues out of the Petty Bag Office, and must be directed to the proper County Courts, which are now courts of record. For forms, see App. B. (10), (11), and (12).

Part II. Chap. XII.

distress again delivered to him on giving the like security as before.

But if the plaintiff were a second time nonsuited, or if the defendant had judgment upon verdict or demurrer in the first replevin, the defendant was to have a writ of "*return irreplevisable;*" after which no writ of second deliverance was allowed (*t*).

Proceedings on the replevin bond.

An action on the replevin bond may be brought immediately on the condition being broken (*u*). It should be brought in the name of the obligee (*x*).

By sect. 108 of the 51 & 52 Vict. c. 43, the Court in which any action on the bond shall be brought may by rule or order give such relief to the obligors as may be just; and such rule or order shall have the effect of a defeasance of such bond. The plaintiff cannot recover more than the penalty and costs of suit on the bond. Therefore proceedings in such suit may be stayed on payment of the penalty and the costs, though the plaintiff's costs in the replevin suit much exceed the penalty (*y*). A plaintiff who has received taxed costs only, on staying a replevin suit, cannot recover the extra costs as damages in an action for a vexatious and excessive distress (*z*). A judge at chambers may order a stay of proceedings (*a*).

Liability of sureties.

Before the 51 & 52 Vict. c. 43, it was decided that on a distress for rent the sureties were not either jointly or separately liable beyond the amount of the rent in arrear at the time of the distress and the costs of the replevin

(*t*) 2 Inst. 340; Stephen's Com. 7th ed. vol. iii. p. 617.

(*u*) Gilb. Replevin, 225; *Waterman* v. *Yea*, 2 Wils. 41; *Turner* v. *Turner*, 2 B. & B. 107; *Perreau* v. *Beavan*, 8 D. & R. 72; Arch. Prac. by Prentice, 13th ed. 1454.

(*x*) *Ibid.*

(*y*) *Branscombe* v. *Scarborough*, 6 Q. B. 13; *Hefford* v. *Alger*, 1 Taunt. 218; *Gingell* v. *Turnbull*, 3 Bing. N. C. 881. See also *Wharton* v. *Blacknell*, 12 M. & W. 558.

(*z*) *Grace* v. *Morgan*, 5 L. J. C. P. 180; *Jenkins* v. *Biddulph*, 4 Bing. 160.

(*a*) *Branscombe* v. *Scarborough, supra.*

suit (*b*). And they were only liable to the amount of the value of the goods seized, if the rent amounted to so much, or to the amount of the rent if it were less than that value, adding to such liability in either case the amount of the cost of the replevin suit. But in no case were they liable beyond the amount of the penalty (*c*).

We have already set out sect. 109 of 51 & 52 Vict. c. 43, which gives the proceedings necessary for obtaining payment of the sum deposited in lieu of a bond (*d*). The application should be founded upon sufficient affidavits showing the breach of the condition, or other facts, as the case may be.

Judgment, whether final or interlocutory.

In an action on a replevin bond, where the plaintiff, instead of claiming damages, claimed the amount for which the bond was given, and judgment went by default, such judgment was held to be final, and not interlocutory; and there was no necessity for a writ of inquiry, the old procedure (as to applying for a stay of proceedings) not being altered by the Judicature Act, 1875 (*e*).

Right to begin.

Where, in an action of replevin, the tenant pleaded that a distress had not been made within twenty years next after the time when the right to distrain first accrued, it was held that on the trial the plaintiff (the tenant) was entitled to begin, since it lay on him to show when the distress was made (*f*).

Upon the hearing of a special case stated in replevin the plaintiff has the right to begin (*g*).

(*b*) *Ward* v. *Henley*, 1 Y. & J. 285.

(*c*) *Hunt* v. *Round*, 2 Dowl. 558; *Myers* v. *Lockwood*, 9 Dowl. 975.

(*d*) *Ante*, p. 353.

(*e*) *Dix* v. *Groom*, L. R. 5 Ex. Div. 91.

(*f*) *Collier* v. *Clarke*, 5 Q. B. 467.

(*g*) *Vigar* v. *Dedman*, 24 L. T. N. S. 734.

Part III.

DISTRESS FOR POOR AND HIGHWAY RATES, &c.

CHAPTER XIII.

Section I.—*Distress for Poor and Highway Rates and Taxes.*

I. Poor rates.

We will now give the summary powers which are provided by the legislature for the levying and collecting of poor rates and taxes, and for the better enforcement of penalties imposed by justices. It is not our intention to discuss this subject at any length, but we think it may be convenient if we shortly state the law and decisions relating thereto.

Powers of distress and sale on non-payment of poor rates.

And first as to poor rates. By the statute 43 & 44 Eliz. c. 2, sect. 4, it is provided that "it shall be lawful as well for the present as subsequent churchwardens and overseers, or any of them, by warrant, from any two justices (as provided by the Act), to levy the sums therein mentioned for poor rates and all arrears, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods, rendering to the parties the overplus; and in default of such distress, it shall be lawful for any two such justices of the peace to commit him or them to the common gaol of the county, there to remain without bail or mainprize until payment of the said sums and arrears."

Power of committal in default of distress.

Powers of succeeding overseers.

If a person rated to the poor refuses to pay his quota during the year of office of the overseers who made the rate, he can be compelled to pay by any subsequent overseers;

and it is not necessary that such overseers should be the immediate successors of those who made the rate (*a*). And the justices may issue a warrant against a churchwarden or overseer on the complaint of his co-churchwardens or overseers, just the same as against any other person; for the law will not infer payment of the rate from the mere fact that the party is a churchwarden or overseer (*b*). It seems also that overseers are liable to an action for an illegal distress upon a person who is not the occupier (*c*).

Where a person is rated for premises in his occupation, and for others which are not, the whole assessment is a nullity, and an action will lie (*d*).

Sect. 47 of the Summary Jurisdiction Act, 1879, does not apply to poor rates.

We may remark that the Summary Jurisdiction Act, 1879 (*e*), does not by the 47th section affect or apply to proceedings for the recovery of poor rates and other rates recoverable in the same manner as poor rates; and a distress warrant in respect of such rates may be issued in the same way as before that Act (*f*).

So the issuing of a distress warrant to levy rates under a local Act does not come within the limitation of time provided by sect. 11 of Jervis's Act (*g*); and, therefore, the justices have power to issue such warrant at *any* time (*h*).

Lodgers' goods.

Under a local Act, which enacted that the rates directed by that Act should be recoverable in the same manner as poor rates, and which also enacted that the goods of any person occupying a furnished house should be liable to be distrained for the said rates; it was held that the goods of

(*a*) *Overseers of East Dean* v. *Everett*, 30 L. J. M. C. 117. See also 17 Geo. 2, c. 38, s. 11.

(*b*) *Skingley* v. *Surridge*, 11 M. & W. 503.

(*c*) *L. & N. W. Rail. Co.* v. *Giles*, 33 J. P. 776, 801.

(*d*) *L. & N. W. Rail. Co.* v. *Buckmaster*, 44 L. J. M. C. 29, 180.

(*e*) 42 & 43 Vict. c. 49.

(*f*) *Reg.* v. *Price*, L. R. 5 Q. B. D. 300.

(*g*) 11 & 12 Vict. c. 43.

(*h*) *Sweetman* v. *Guest*, L. R. 3 Q. B. 262.

Part III. Chap. XIII.

a lodger might be distrained for rates due from the landlord (*i*).

Second distress.

In some cases a second distress may be made for the same rates; as where the party has been prevented from distraining originally by violence (*k*).

What the rate must show.

A rate made for the relief of the poor must show by intrinsic or other evidence for what purpose it was made; and if it does not do so the Court will not compel justices to issue their distress warrant for levying such a rate (*l*).

Evidence of the rate.

The production of the book containing the poor rate, with the allowance by the justices, is, if the rate is made in the form prescribed by law, *primâ facie* evidence of the making and publication of the rate (*m*).

An appellant against a distress warrant, issued to enforce payment of poor rates, cannot, under sect. 7 of 17 Geo. II. c. 38, avail himself of any objection which he might have urged against the rate itself on appeal to the sessions under sect. 4. Nor will the Court grant a mandamus to justices to hear such appeal against the warrant, if the application discloses no grounds of appeal other than the grounds which might have been urged against the rate (*n*).

Demand of rate.

As it is a maxim in our law that no man shall be punished without having an opportunity of first being heard in his defence, the rate must first be demanded of the party who is liable to pay it (*o*). And the demand must be for the sum actually due (*p*). It has been decided in a case of distress for taxes, that if a party

What is a sufficient demand.

(*i*) *Peppercorn* v. *Hoffman*, 9 M. & W. 618.

(*k*) *Lee* v. *Cooke*, 2 H. & N. 584; 3 H. & N. 203.

(*l*) *Reg.* v. *Eastern Counties Rail. Co.*, 5 El. & Bl. 974.

(*m*) 32 & 33 Vict. c. 41, s. 18.

(*n*) *Reg.* v. *JJ. of Kent*, 16 L. T. N. S. 673.

(*o*) *Rex* v. *Benn & Church*, 6 T. R. 198. See also *Painter* v. *Liverpool New Gas & Coke Co.*, 3 Ad. & Ell. 433.

(*p*) *Hurrell* v. *Wink*, 8 Taunt. 369.

from whom such taxes are due has an intimation that they have been called for by the collector, that is sufficient evidence of a demand to make the distress for the arrears of taxes legal; and it is not necessary that the specific sum due should have been demanded *personally* of the householder, or that the refusal to pay should be to the collector himself (*q*). And after the demand a reasonable time must elapse previous to the distress, in order that the party may have an opportunity of complying with such demand (*r*). Where an assessment was made for poor rates, and demanded of a person who subsequently died, and a distress was levied, and the warrant served on his representatives; it was held that an action would lie against the distrainor for distraining the goods in the hands of the deceased's representatives, if no demand of the money had been made upon the representatives; but that it was doubtful whether such a distress would be lawful after a previous demand of the money made upon the representatives (*s*).

After demand a reasonable time must elapse before the distress.

Where there is a remedy by distress, the rate cannot be recovered by action (*t*); but in a case where certain duties were required to be paid by shipowners, and on non-payment the ships were to stand charged with the payment of the same; it was held that a remedy was allowed either by action or distress (*u*).

No action where there is a remedy by distress.

If the rate, when demanded, is not paid, the churchwardens and overseers, or any of them, may make complaint thereof to a justice of the peace of the county, &c., and obtain a summons for the party, and serve it (*x*).

Complaint.

(*q*) *Rex* v. *Ford*, 2 Ad. & Ell. 588; *Reg.* v. *JJ. of Gloucester*, 24 J. P. 39 (church-rate case).

(*r*) *Gibbs* v. *Stead*, 8 B. & C. 528 (distress for land tax).

(*s*) *Stevens* v. *Evans*, 2 Burr. 1152. See also *Wallis* v. *Hewet*, Guildhall Sittings, Hilary Term, 59, 2.

(*t*) *Danby* v. *Watson*, 36 L. T. N. S. 412.

(*u*) *Shepherd* v. *Hills*, 11 Exch. 55.

(*x*) For forms, see Appendix C. (1) and (2); Archbold's Poor Law, by Glen, 14th ed. p. 1001.

What must be proved.

It must be proved on oath that the party was rated, and had neglected to pay for seven days after demand (*y*); and if the defendant do not appear, proof on oath must be given of the due service of the summons (*z*).

Consolidation of proceedings for the recovery of rates.

By the statute 25 & 26 Vict. c. 82, s. 1, it is provided that "where any number of local rates and taxes, whether of the same or different kinds, are due from the same person, the rates or taxes so due may be included in the same information, complaint, summons, order, warrant, or other document required by law to be laid before justices, or to be issued by justices; and every such document as aforesaid shall, as respects each rate or tax comprised in it, be construed as a separate document; and its validity as respects any one rate or tax shall not affect its validity as respects any other rate or tax comprised in it."

Summons for non-payment of rate.

By the statute 12 & 13 Vict. c. 14, s. 5, it is enacted that "every summons to be issued against any person for non-payment of any sum for which he or she is or shall be rated or assessed shall be directed to such person, and may be in the form in the schedule to that Act annexed (*a*) or in any form to the like effect." It may be issued by one justice, and served by any churchwarden or overseer of the poor, or surveyor of the highways, respectively, or constable, or other person, to whom it shall be delivered for that purpose, upon the person to whom it is so directed, by delivering the same to the party personally, or by leaving the same with some person for him or her at his or her last place of abode, or upon the premises where the last place of abode is not known (*b*); and the person who shall serve the same in manner aforesaid shall attend at the time and place, and before the justices in the said summons mentioned, to depose, if necessary, to the service of the said summons.

Service of summons.

Proof of service.

(*y*) 54 Geo. 3, c. 170, s. 12.
(*z*) 12 Vict. c. 14, s. 5.
(*a*) For form, see Appendix C. (3).
(*b*) 31 & 32 Vict. c 122, s. 39.

Warrant of distress.

When justices are bound to issue a warrant.

After the party summoned for non-payment of the rate attends, but does not show sufficient cause for its non-payment, the justices will grant a distress warrant against him (*c*). If a rate be legal, however inconvenient and oppressive the mode of rating may appear to be, and however much the justices may be convinced of this, they are bound to issue their warrant of distress (*d*); and they are also bound to enforce the rate, if it appears to be good on the face of it, and has not been appealed against; and they cannot inquire whether it is retrospective or invalid (*e*). But the Court of Queen's Bench will not grant a rule to compel justices to issue a warrant of distress where the order of the justices appears to be invalid (*f*).

Invalid order of justices.

They are also bound to issue their warrant if it be proved that the party rated is in the visible occupation of the property; and they cannot go into the question as to whether the occupation is beneficial or not, as that is only a question for the Quarter Sessions on appeal (*g*); but if the Court considers that the circumstances are not sufficient to constitute the party an occupier, they will not compel the justices by mandamus to issue their warrant, and so subject them to the risk of an action (*h*). If the rate be objected to on grounds which may render it invalid, or if an objection be made to the mode of assessment, which may affect the right to enforce the rate, or if the parochiality of the property is in dispute, the safe course is for the justices to decline to interfere, except in obedience

Course for justices to pursue.

(*c*) For forms, see Appendix C. (4) and (5).

(*d*) *Rex* v. *Hasler, JJ. of Essex*, 3 L. J. M. C. 56; *Reg.* v. *Boteler*, 33 L. J. M. C. 101.

(*e*) *R.* v. *JJ. of Kingston*, 23 J. P. 5. But see *R.* v. *Barclay, JJ. of Essex*, 46 J. P. 167. See also *Brown* v. *Hutchinson*, 31 L. J. M. C. 229, and *R.* v. *JJ. of Essex*, 41 J. P. 676.

(*f*) *R.* v. *Collins*, 21 L. J. M. C. 73.

(*g*) *Reg.* v. *Bradshaw, JJ. of Warwick*, 2 El. & E. 836, approving of *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868; and *Marshall* v. *Pitman*, 9 Bing. 595.

(*h*) *R.* v. *JJ. of Bucks*, cited in *Rex* v. *Hasler*, *supra*, at p. 58.

to a mandamus (*i*). Where commissioners, appointed by statute for building a bridge, conveyed the tolls to a body of subscribers, with a power of distress for non-repairs, and one of the subscribers being assessed under a poor rate, with others, for a part of the bridge, disputed his liability before the justices, who declined to issue a distress warrant; it was held that such person could be distrained upon for the rate, and must obtain contribution from the other subscribers (*k*).

Assessment for a part.

Upon a summons before justices to enforce a poor rate against a railway company, it appeared that property occupied by the company had been assessed by the description "offices and land with rails," but that in estimating the amount of the rate, the overseers had treated certain buildings as being in the occupation of the company, which were not in fact in their occupation. The company had not appealed against the rate. It was held that the objection being matter of appeal, and the rate good on the face of it, the justices were bound to issue a distress warrant (*l*).

A warrant of distress for poor rates, which recited that the rate was made on the 25th of November, that being, in fact, the date of its allowance (it having been made on the 24th of September), and alleged the refusal to pay the rate to have been "duly proved," instead of proved on oath, was held to be good (*m*). A. was indicted for the rescue of a distress from a collector of poor rates. The name of the defendant did not appear in the rate, and there was no name or description of the parties liable to the payment of it in the appropriate column, except the

(*i*) *R.* v. *Pearson*, 19 J. P. 294; *R.* v. *Barclay, JJ. of Essex*, 46 J. P. 167; Stone's Justices' Manual, 22nd ed. 583.

(*k*) *R.* v. *Paynter*, 7 Q. B. 255, affirmed in 10 Q. B. 988. See also *Paynter* v. *R.*, 16 L. J. M. C. 136.

(*l*) *Overseers of Poor of Manchester* v. *Headlam and L. & N. W. Rail. Co.*, 21 Q. B. D. 96.

(*m*) *Ormerod* v. *Chadwick*, 16 M. & W. 367.

general words "tenants of common." The transcript of the rate-book, to which the collector's warrant was annexed, was similarly defective. It was not disputed that A. was the occupier of the land, and might have been rated as such; held, that under the above warrant the collector had no power to distrain the defendant's goods, and that the indictment could not therefore be sustained (*n*). A warrant of distress for a church rate which did not specify the time at which the distress was to be sold, was held bad (*o*).

By a local Act, it was enacted that lessors should be rated for poor rates, and that the person authorised to collect the rents should be taken to be the lessor, and liable to be rated, *unless the real lessor should declare himself, or be known to be the lessor*, to the vestrymen. S. was rated in the books as owner, but the vestry rated the collector, and levied a distress warrant upon him, the form of the warrant being to the "landlord or owner." The Court refused a mandamus to compel the justices to issue a distress warrant against such collector, as the real owner was known by them, and had his name in the books (*p*).

Where the guardians of a union have claimed and received sums from the overseers of a parish under precepts based upon the valuation list then existing, and it has subsequently been decided upon an appeal against a rate that that valuation list is too high, the guardians may give credit for the sums overpaid by the parish, and the justices may refuse to enforce by distress a precept for a general rate where such sums are overpaid (*q*).

Abandonment of a bad warrant.

In an action of replevin the defendants avowed having taken the goods as a distress for poor rates, and justified taking one joint distress for four different rates under four

(*n*) *R.* v. *Boyle*, 7 Cox, C. C. 328; *Sabourin* v. *Neale*, 2 H. & W. 103.

(*o*) *Reg.* v. *Williams*, 19 L. J. M. C. 126.

(*p*) *Rex* v. *Dyer and Hall, JJ. of Middlesex*, 2 Ad. & Ell. 606.

(*q*) *Tynemouth Union* v. *Overseers of Backworth*, 4 Times Law Rep. 492.

different warrants, one of which warrants was bad, being upon a rate for premises of which the plaintiffs were not the occupiers; it was held that the replevisor might justify under the good warrants and abandon the bad (*r*).

Power of justices to proceed *ex parte*.

By the statute 12 & 13 Vict. c. 14, s. 5, it is enacted that "if upon the day and at the place appointed in and by the said summons for the appearance of the party so summoned, such party shall fail to appear accordingly in obedience to such summons, then, if it be proved upon oath to the justices then present that such summons was duly served as aforesaid a reasonable time before the time so appointed for his or her appearance as aforesaid, it shall be lawful for such justices of the peace, in their discretion, if they shall so think fit, to proceed *ex parte* in the same manner, to all intents and purposes, as if such party had personally appeared before them in obedience to the said summons."

And by sect. 3 it is enacted that "for the saving of expense in the levying of any sum or sums for rates and costs as aforesaid, it shall be lawful to make and issue one warrant of distress against any number of persons neglecting or refusing to pay the same, in the form in the schedule to that Act annexed" (*s*).

To whom warrants should be directed.

And by sect. 4 it is enacted that "the warrants may be directed to the churchwardens and overseers of the poor, or to any one or more of them, as by the justices granting the same shall be deemed fit."

Bill of sale not to protect chattels against poor and parochial rates.

By the statute 45 & 46 Vict. c. 43, s. 14 (Bills of Sale Amendment Act, 1882), it is enacted that "a bill of sale, to which that Act applies, shall be no protection in respect

(*r*) *Governors of Bristol Poor* v. *Wait*, 1 Ad. & Ell. 264. See also *Lee* v. *Vesey*, 1 H. & N. 90 (drainage rates); *Patchett* v. *Bancroft*, 7 T. R. 367; *Simpkin* v. *Robinson*, 45 L. T. N. S. 221.

(*s*) For form, see Appendix C. (5).

of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates."

Refusal by justices to grant a warrant.

In former times justices often refused to grant distress warrants for poor rates, as it might have subjected them to an action of trespass. So where magistrates granted a warrant to levy poor rates upon a party who had no land in the parish in which the rate was made, an action of trespass was held to lie against them (*t*). But the Court will not permit justices to annex conditions to the performance of their duty which the law does not warrant; and where they refused to issue a distress warrant for levying a poor rate unless an indemnity were given, the Court issued a mandamus commanding them to do so (*u*).

No action against person acting under peremptory writ of mandamus.

Now, however, by the statute 6 & 7 Vict. c. 67, s. 3, "No action, suit, or any other proceeding shall be commenced or prosecuted against any person or persons whatsoever, for or by reason of anything done in obedience to any peremptory writ of mandamus, issued by any Court having authority to issue writs of mandamus."

No action for issuing a distress warrant for poor rates by reason of any defect in the rates or of party not being rateable; or for the manner in

By the statute 11 & 12 Vict. c. 44, s. 4, "where any poor rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any *irregularity or defect* in the said rate, or by reason of such person not being liable to be rated therein; and in all cases where a discretionary power shall be given

(*t*) *Weaver* v. *Price*, 3 B. & Ad. 409. See also *Rex* v. *Newcombe*, 4 T. R. 368; *Rex* v. *Trecothick*, 2 Ad. & Ell. 405; *Rex* v. *Hughes, JJ. of Stafford*, 3 Ad. & Ell. 425; *Reg.* v. *JJ. of Kingston*, 1 El. B. & E. 256; *Reg.* v. *JJ. of Norfolk*, 7 El. & Bl. 950.

(*u*) *Reg.* v. *JJ. of Middlesex*, 12 L. J. M. C. 36. See also *Reg.* v. *JJ. of Worcester*, 12 Ad. & Ell. 779.

Part III. Chap. XIII.

which a justice exercises a discretionary power.

to a justice of the peace by any Act or Acts of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power." But this section does not apply where the justice acts *without* jurisdiction (*x*). The overseers of the town of B. paid the guardians of T. Union contributions to rates on the basis of a valuation list afterwards found by arbitration to be excessive. On the overseers refusing to pay the amount of two subsequent precepts issued by the guardians, on the ground that they had already paid too much, and that they were entitled to be credited with the surplus, the guardians applied to justices for a distress warrant to enforce their precept. The justices refused to grant the warrant. It was held, upon a case stated, that the justices had a discretion as to granting the warrant, and had exercised it properly (*x*).

And by sect. 5 it is enacted that "in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against it, the said Court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule, and done such act so thereby required as aforesaid." Justices upon due application for a distress warrant are bound to grant it, and place it at the disposition of the overseers. They themselves have nothing to do but to act ministerially (*y*), as a

(*x*) *Guardians of Tynemouth Union* v. *Guardians of Backworth Union*, 59 L. T. N. S. 178.

(*y*) *Reg.* v. *Marsham*, 50 L. T. N. S. 142.

(*v*) *Reg.* v. *Yarmouth*, 16 L. J. M. C. 175; *Pedley* v. *Davies*, 26 J. P. 343, 370; 31 J. P. 655; *Nichols* v. *Walker*, Cro. Car. 394; *Milward* v. *Caffyn*, 2 W. Bl. 1330.

kind of sheriff, in the execution of the process. So justices in issuing a distress warrant for the recovery of poor rates have no power to order that there shall be any delay in the execution of the warrant (*z*).

One writ of mandamus may go to compel the issue of two warrants of distress for two rates against the same individual. It is not necessary that the mandamus should be directed against all the justices who refuse the warrants, but if the Court sees that any two have been selected, or that any of the justices so acting have been omitted for any improper purpose, all will be required to be joined (*a*).

One writ of mandamus may compel the issue of two warrants of distress.

A mandamus may be directed against a justice who is interested in the property rated, if he has acted as a justice in refusing the warrant (*b*).

To whom the mandamus may be directed.

Costs.

By the statute 12 & 13 Vict. c. 14, s. 1, it is enacted that "it shall be lawful for all justices of the peace, if in their discretion they shall so think fit, in any warrant of distress they shall make and issue for the levying of any sum to which any person is now or may hereafter be rated or assessed, in or by any rate or assessment for the relief of the poor, or in or by any other rate or assessment, which by law now or hereafter is or shall be directed to be enforced or recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the same, to order that a sum such as they may deem reasonable, for the costs and expenses which such overseers, or the persons applying for such warrant, shall have incurred in obtaining the same, shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping, and selling of the said distress." Previously to this Act parish officers levying a poor rate under a warrant of distress could retain of the goods sold the necessary expenses of the distress and sale (*c*). In a case decided on the Act, where the plaintiff was assessed for poor rates which he did not pay, nor did he appear before the justices when summoned, and the justices issued a warrant directed to the overseers of the parish to levy a distress on his goods, and for a

Order for levying costs.

(*z*) *Reg.* v. *Handsley, JJ. of Burnley*, L. R. 7 Q. B. D. 398.

(*a*) *Reg.* v. *Ellis and Greenwood*, 12 L. J. M. C. 20.

(*b*) *Reg.* v. *Ellis and Greenwood*, *supra*.

(*c*) *Moyse* v. *Cocksedge*, Willes, 636.

further sum of 6*s.* for costs incurred by the said overseers, and the plaintiff tendered to the deputy of the overseers the amount of the rate, but not the costs; it was held that the justices had power to award the costs to the parties applying for the warrant (*d*).

Broker's charges.

By the statute 39 & 40 Vict. c. 61, s. 31, it is enacted that "in all cases where a warrant of distress is issued for the recovery of a poor rate, the person against whom the same is issued shall be liable to pay the costs of such warrant, *and of the broker*, or other officer, for his attendance to make the levy, although such person may tender the amount of the rate before any levy is made."

Commitment in default of distress.

By the statute 12 & 13 Vict. c. 14, s. 2, it is enacted that "when to any warrant of distress for the levying of any sum or sums, to which any person or persons may hereafter be rated or assessed in or by any rate or assessment, it shall be returned by the constable or person having the execution of such warrant that he could find no goods or chattels, or no sufficient goods or chattels, whereon to levy such sum or sums, together with the costs of or occasioned by the levying of the same, it shall be lawful for any two or more justices of the peace before whom the same shall be returned, or for any two or more justices of the peace for the same county, riding, division, liberty, city, borough, or place, if in their discretion they shall so think fit, to issue their *warrant of commitment* (*e*) against the person with relation to whom such return shall be so made as aforesaid, in the form in the schedule to that Act annexed (*f*), or in any form to the like effect, and thereby order such person to be imprisoned in the common gaol, or house of correction, for any time not exceeding three calendar months, unless the sum or sums

Warrant of commitment.

Order for imprisonment.

(*d*) *Walsh* v. *Southwell*, 6 Ex. 150. See also *Davies* v. *Pedley*, 3 L. J. C. P. 120.

(*e*) *Reg.* v. *JJ. of New Sarum*, 20 L. T. N. S. 207.

(*f*) For form, see Appendix C. (6).

therein mentioned shall be sooner paid; and every such warrant of commitment made or issued for default of distress as aforesaid, shall be made as well for the non-payment of the costs and expenses so as aforesaid incurred in obtaining such warrant of distress, if the same shall be so ordered as aforesaid, and the costs attending the said distress, and also the costs and charges of taking and conveying the party to prison (the amount of such costs, expenses, and charges being stated in such warrant of commitment), as for the non-payment of the sum or sums alleged to be due for the said rates respectively" (*g*). "But nothing therein shall be deemed or construed to authorize justices to grant or issue one warrant of commitment against several persons in default of distress as aforesaid" (*h*).

Costs.

Where a local Act for a borough, in providing for the recovery of a poor rate, gave a power of commitment in default of distress only in cases where it was proved that the party had removed his goods to avoid a distress, and afterwards the 12 & 13 Vict. c. 14, was passed, an application being made to the borough justices for a warrant of commitment, in a case where there had been no removal of goods, and they refused it, saying that within the borough they were bound to proceed according to the local Act, and could not act otherwise; it was held, by the Court of Queen's Bench, that they had authority to commit under the 12 & 13 Vict. c. 14 (*i*). But if the application be made against a person, who since the rate was made has become a bankrupt, and obtained his certificate, the distress warrant must not be granted; for the certificate is a bar to the demand (*k*).

Removal of goods to avoid distress.

(*g*) 12 & 13 Vict. c. 14, s. 2.
(*h*) Sect. 3.
(*i*) *Reg.* v. *JJ. of New Sarum*, 17 J. P. 53.
(*k*) *Re Weatherall & Courthope*, 19 L. J. M. C. 115; *Phillips* v. *Naylor*, 22 J. P. 355; Archbold's Poor Law, by Glen, 14th ed. p. 1004.

Tender of rates and costs.

By the statute 12 & 13 Vict. c. 14, s. 6, it is enacted that "in all cases where any proceedings shall be taken to compel payment of any sum for which any person shall be rated, if at any time before such person shall be committed to, or lodged in prison, for non-payment thereof, or for or by reason of its being returned to such warrant of distress as aforesaid that there are no goods or chattels, or no sufficient goods or chattels of such person whereon the same may be levied as aforesaid, such person shall *pay or tender* to the churchwardens or overseers of the poor, or any of them, or other person authorized to collect or receive such rates, the sum so sought to be recovered, together with the amount of all costs and expenses up to that time incurred in the proceedings so taken to compel payment thereof as aforesaid, then the person to whom such sum and costs shall be so paid or tendered shall receive the same, and thereupon no further proceedings for the recovery of the same shall be had or taken" (*l*).

Stay of proceedings.

Appeal.

By the statute 41 Geo. III. c. 23, s. 2, it is enacted that "all and every the sum and sums of money at which any person or persons is, or are, or shall be rated or assessed, in any rate or assessment made for the relief of the poor of any parish, township, vill, or place, shall and may be levied and recovered by distress, and all other lawful ways and means, notwithstanding the person or persons so rated or assessed, or any other person or persons, shall have given *notice of appeal* from or against such rate or assessment, for any cause whatsoever; provided always, that if any person, rated or assessed in any rate or assessment made for the relief of the poor, shall give such notice of appeal as hereinafter mentioned to the churchwardens and overseers of the poor of any parish, township, vill, or place, or any two of them, then, from and after the giving of such notice, and until the appeal shall have been heard

(*l*) See *Walsh* v. *Southwell*, 20 L. J. M. C. 165.

and determined, no proceedings shall be commenced or carried on to recover any greater sum or sums of money from such person or persons than the sum or sums at which he, she, or they, or any occupier of the same premises, shall have been rated or assessed in the last effective rate which shall have been collected in such parish, township, vill, or place."

Stay of proceedings.

And by sect. 3 it is enacted that "in case the said Court of General or Quarter Sessions of the peace shall upon appeal order any rate or assessment for the relief of the poor to be quashed, it shall be lawful for the said Court to order that any sum or sums of money, in and by such rate or assessment charged on any person or persons, or any part of any such sum or sums shall not be paid; and then, and in every such case, no proceedings shall, after making such order, be commenced; or if any proceedings have been previously commenced, such proceedings shall be no further prosecuted, or carried on, for the purpose of levying or enforcing the payment of any sum or sums which shall be so ordered by the said Court not to be paid as aforesaid: provided always, that no justice of the peace, constable, or other officer of the peace, or other person, shall be deemed a trespasser, or liable to any action, for any warrant, order, act, or thing which such justice, constable, or other officer or person shall have granted, made, executed, or done for the purpose of levying or enforcing the payment of any such sum or sums of money, before he shall have had notice in writing of the order for the non-payment of such sum or sums of money, which the said Court is hereby authorized to make as aforesaid."

Where the rate is ordered to be quashed.

Stay of proceedings.

Notice of order to be given to officer.

And by sect. 8 it is enacted that "if upon the hearing of any appeal from any rate or assessment for the relief of the poor, the Court of General or Quarter Sessions of the peace shall order the name or names of any person or persons to be struck out of such rate or assessment, or the

Refunding of money where person's name

sum or sums rated or assessed on any person or persons to be decreased or lowered, and if it shall be made appear to the said Court that such person or persons hath or have, previously to the hearing of such appeal, paid any sum or sums of money, in consequence of such rate or assessment, which he, she, or they ought not to have paid or been charged with, then, and in every such case, the said Court shall order all and every such sum and sums of money to be *repaid* and returned by the said churchwardens and overseers of the poor, to the person or persons having paid the same respectively, together with all reasonable costs, charges, and expenses occasioned by such person or persons having paid, or been required to pay, the same; and all and every the sum and sums of money so ordered to be repaid or returned by the churchwardens and overseers of the poor, or any of them, shall and may, together with all such costs, charges, and expenses as aforesaid, be levied and recovered from them, or any of them, by distress, and all such other ways and means as the money charged, rated, or assessed on any person, by any rate or assessment made for the relief of the poor, can or may be by law levied or recovered."

struck out, or rate decreased,

together with costs.

The validity of a rate cannot be tried by a special case.

The validity of a rate must be tried by appeal, and not by a case under 20 & 21 Vict. c. 43, unless a question of law arises upon application for a distress warrant; and this does not seem to be affected by the Summary Jurisdiction Act, 1879, which allows any order, determination, or other proceeding to be questioned by a special case; for the justices do not appear to be a court of summary jurisdiction within the meaning of that statute (*m*).

Appeal against a parish rate.

An appeal against a parish rate to the Court of Queen's Bench can be enforced by a warrant of distress from the justices in the same way as a poor rate (*n*).

(*m*) Stone's Justices' Manual, 22nd ed. 585.

(*n*) *Ex parte May*, 2 B. & S. 426.

Where a waterworks company and the assessment committee of a union referred certain disputes as to rating to arbitration, and, pending the award, rates were still levied by the overseers and paid under protest by the appellants, but without giving notice of appeal, or taking any steps to dispute such rights, and the award being made, and the rateable value largely reduced, and the overseers refused to act on part of it, levying a subsequent rate, and distraining on the appellants for the amount; it was held that the overseers had acted contrary to good faith, and the Court interfered and stopped their further proceeding (*o*).

In order to prevent a distress for the full amount of a rate, and to limit the right of an overseer to distrain for the sum assessed in the last effective rate, according to sect. 2 of the above Act (*p*), the party rated and intending to appeal must give a regular notice of appeal before the levy; and if he neglect to give such notice, and pay the whole amount under a distress to the overseer, who pays it over to a guardian of the poor, pursuant to sect. 8 of 22 Geo. III. c. 83, and on appeal the rate is reduced, he cannot recover the excess in an action for money had and received against such overseer (*q*).

Notice of appeal.

Where there has been a wrongful distress for poor rates, the application to the sessions under sect. 8 of this Act (*r*) for the refunding of the money obtained by such wrongful distress, must be made at the same sessions at which the rate is amended and reduced (*s*).

By the statute 17 Geo. II. c. 38, s. 7, it is enacted that "the goods of any person assessed, and refusing to pay, may be levied by warrant of distress not only in the place

The place where the goods may be levied.

(*o*) *Leicester Waterworks Co.* v. *Overseers of Cropstone*, 44 L. J. M. C. 92. See also *L. & N. W. Rail. Co.* v. *Bedford*, 17 Q. B. 978.

(*p*) 41 Geo. 3, c. 23.

(*q*) *Priestly* v. *Watson*, 2 Cromp. & M. 691.

(*r*) 41 Geo. 3, c. 23.

(*s*) *Rex* v. *JJ. of St. Peter's Library, York*, 2 L. J. M. C. 46.

for which such assessment was made, but in any other place within the same county or precinct; and if sufficient distress cannot be found within the said county or precinct, on oath made thereof before some justice of any other county or precinct, such goods may be levied in such other county or precinct by virtue of such warrant and certificate; and if any person shall find himself aggrieved by such distress as aforesaid, it shall be lawful for such person to appeal to the next general or quarter sessions of the peace for the county or precinct where such assessment was made, and the justices there are thereby required to hear and finally determine the same."

Place where appeal may be had.

And by the statute 54 Geo. III. c. 170, s. 12, it is enacted that "the goods and chattels of any person or persons neglecting or refusing to pay any sum or sums of money legally assessed on and due from him or them in respect of any rate for the relief of the poor, &c. of any parish, township, or hamlet, for the space of seven days after the same shall have been legally demanded of him or them, shall and may be distrained, not only within such parish, township, or hamlet, but also within any other parish, township, or hamlet within the same county, riding, division, or jurisdiction; and if sufficient distress cannot be found within the same county, riding, &c., then upon oath thereof made before any one or more justice or justices of the peace of any other county, riding, &c. in which any of the goods or chattels of such persons shall be found, which oath such justice or justices are hereby required to administer and certify by endorsing in his or their respective handwriting his or their name or names on the warrant granted to make such distress, the goods and chattels of the said person or persons so neglecting or refusing to pay as aforesaid shall be subject and liable to such distress and sale in such other county, riding, &c. where the same shall be found, and may by virtue of such warrant and certificate be distrained and sold in the same manner as if the same had been found within the parish,

Place where distress may be levied.

township, or hamlet, in or for which such rate had been made or was due."

The Court will not grant a *certiorari* to remove a warrant of distress to levy poor rates into a higher Court (*t*).

II. Highway rates.

Highway rates are recoverable by distress in the same manner as rates for the relief of the poor (*u*). As we have seen, the Summary Jurisdiction Act, 1879, does not affect or apply to proceedings for the recovery of highway rates (*x*).

By the statute 12 & 13 Vict. c. 14, s. 1, it is enacted that "in any warrant of distress under the statute of 43 Eliz. c. 2, and 5 & 6 Will. IV. c. 50, which justices shall issue for the levying of highway rates, or any other rate or assessment which by law then or thereafter is or shall be directed to be recovered in the same manner as a poor rate, or in any warrant for the levying of any arrears of the same, it shall be lawful for them to order that a sum, such as they may deem reasonable, for the costs and expenses which such overseers and surveyors, or the persons applying for such warrant, shall have incurred in obtaining the same, shall also be levied of the goods and chattels of the person or persons against whom such warrant shall be granted, together with the reasonable charges of the taking, keeping, and selling of the said distress."

Recovery of costs.

How the warrant is to be directed.

One warrant of distress may be issued against any number of persons neglecting or refusing to pay the rate (*y*).

To whom the warrant shall be directed.

The warrants may be directed to the surveyors of the highway (or clerk to the highway board, under 27 & 28 Vict. c. 181, s. 35), and to the constable of the parish or township, or to any other person or persons, or to any one

(*t*) *Ex parte Taunton*, 1 Dowl. Rep. 54.

(*u*) See 12 & 13 Vict. c. 14; 13 & 14 Vict. c. 99, and other special statutes.

(*x*) *Reg.* v. *Price*, L. R. 5 Q. B. D. 300; *ante*, p. 375.

(*y*) Sect. 3 of 12 & 13 Vict. c. 14.

Part III. Chap. XIII.

or more of them, as by the justices granting the same shall be deemed fit (*z*).

Payment or tender of rate.

In all cases where any proceedings shall be taken for payment of these rates, if at any time before the defaulter shall be lodged in prison for non-payment thereof, or where there is no sufficient distress, such person shall pay or tender to the surveyor of highways, or other person authorized to collect or receive such rate, the sums so sought to be recovered, together with the amount of all costs and expenses up to that time incurred in the proceedings so taken to compel payment thereof as aforesaid, then the person to whom such sum and costs shall be so paid or tendered shall receive the same, and thereupon no further proceedings for the recovery of the same shall be had or taken (*a*).

Stay of proceedings.

Appeal.

Appeal by a person aggrieved lies against any rate or order made by a justice in pursuance of this Act, as against the appointment of surveyors (*b*); but it does not lie by a surveyor against the disallowance of an item in his account at petty sessions (*c*).

After a highway rate for a parish has been regularly made and assessed, and an occupier of premises included in such rate has neglected to appeal within the time allowed by the statute for that purpose, he cannot afterwards successfully set up a claim to exemption from that particular rate; and under the statute 11 & 12 Vict. c. 44, s. 5, the Court will grant a rule to compel the issuing of a distress warrant for the amount, where the justices applied to for that purpose refuse to issue their warrant after hearing the grounds of such exemption, even though the claim of exemption appear to be a substantial one (*d*).

(*z*) 12 & 13 Vict. c. 14, s. 4.
(*a*) *Ibid.* s. 6.
(*b*) *Reg.* v. *JJ. of St. Alban's*, 3 B. & C. 698.
(*c*) *R.* v. *JJ. of Leicester*, 8 E. & B. 557.
(*d*) *Reg.* v. *JJ. of Oxford*, 18 L. J. M. C. 222; *Overseers*

By sect. 86 of the Taxes Management Act (*e*), 1880 :—

"(1.) If a person refuses to pay the sum charged upon him by virtue of the Land Tax Acts, the Tax Acts, or this Act, on demand made by the collector, according to the assessments and warrants (*f*) to him delivered by the Land Tax and General Commissioners, such collector may, and he is thereunto authorized and required, for non-payment thereof, to distrain upon messuages, lands, tenements, and premises charged with such sum of money, or to distrain the person so charged by his goods and chattels, and all such other goods and chattels as the collector is hereby authorized to distrain, without any further authority from the said respective commissioners for that purpose than the warrant to such collector delivered on his appointment.

Distress by collector on refusal to pay.

"(2.) For the purpose of so levying a distress, a collector may, upon warrant under the hands and seals of the said respective commissioners, obtained for that purpose, break open (*g*) in the daytime any house or premises, calling to his assistance any constable or other peace officer for the parish, group, or division where any refusal, neglect, or resistance shall be made. And it shall be the duty of all constables or other peace officers, when so required, to aid and assist the collector in the execution of such warrant and in levying the distress in the house or premises.

He may under warrant break open houses.

"(3.) A levy or warrant to break open shall be executed by or under the direction and in the presence of the collector.

Levy.

"(4.) Every distress levied by a collector shall be kept for the space of five days at the costs and charges of the person so refusing to pay.

of Birmingham Poor, In re Birmingham New Library, 10 Q. B. 868, distinguishing *Reg.* v. *JJ. of Salop*, 13 Q. B. 654.

(*e*) 43 & 44 Vict. c. 19.

(*f*) For form, see App. D. (18).

(*g*) For warrant to break open, see App. D. (21).

Part III. Chap. XIII.

"(5.) If the said person does not pay the respective sums of money so due within the said five days, then the said distress shall be appraised by two or more of the inhabitants where the said distress is taken, or other sufficient persons, and there be sold by public auction by the said collector or his deputy for payment of the said money; the overplus coming by the said distress (if any there be), after deducting the said money and also the costs and charges of taking, keeping, and selling the said distress, which costs and charges the said officer is hereby authorized to retain, shall be restored to the owner thereof.

Powers of (*h*) 33 Geo. 3, c. 55, may be used in recovery of arrears.

"(6.) The provisions in regard to warrants of distress contained in an Act passed in the thirty-third year of His late Majesty King George the Third, intituled 'An Act to authorize justices to impose fines upon constables, overseers, and other peace and parish officers for neglect of duty, masters of apprentices for ill-usage of such their apprentices, and also to make provision for the execution of warrants of distress granted by magistrates,' shall apply to levies and distraints made by collectors for recovery of the duties or land tax."

Where A. by the trusts of his father's will was allowed to use the furniture in the mansion of B. during his life, and was prohibited from removing it thence without the consent of the trustees; it was held that such furniture could not be distrained for A.'s personal taxes returned as payable at the mansion of B., and that it did not fall within the description of "such other goods and chattels" as might be distrained by force of the statute 43 Geo. III. c. 99, s. 33 (*i*).

Collectors advancing duties may

By sect. 87, "if a collector advances and pays over to the collector of inland revenue any sum of money for or on

(*h*) See *post*, p. 405.

(*i*) *Shaftesbury (Earl)* v. *Russell*, 3 D. & R. 84. This statute is repealed by the Taxes Management Act, 1880. But see sect. 86, sub-sect. (1), as to the words "such other goods and chattels."

account of the land tax or the duties assessed on any other person, whether at his request or not, such collector may, in default of repayment to him at any time within the space of six months after such payment, levy the land tax or the duties by the like ways and methods as such collector might have levied the same before such payment thereof to such collector of inland revenue, and as if the same had not been paid or satisfied."

levy the sum paid.

By sect. 89, "if any person shall refuse or neglect to pay any sum charged upon him by virtue of the Tax Acts or this Act within ten clear days after demand as aforesaid, and no sufficient distress can or may be found whereby the same may be levied, the General Commissioners may by warrant under their hands and seals commit (*k*) such person to prison, there to be kept without bail until payment shall be made of that sum or security given for payment thereof, together with such further sum as the said commissioners shall adjudge to be reasonable for the costs and expenses of apprehending and conveying to prison such person; and every such person shall be detained and kept in prison according to the tenor and effect of such warrant."

Commissioners may commit defaulter.

By sect. 90 provision is made in case of removal by which the General Commissioners grant a certificate to the commissioners acting for the parish to which the person has removed, empowering them to distrain (*l*); and by sub-sect. (3), where no sufficient distress can be found within the district where the defaulter may have removed, the commissioners are authorized by warrant to commit (*k*) such defaulter to prison.

Committal where defaulter has removed.

By sect. 105, sub-sect. (1), every schedule of arrears shall remain with the General Commissioners for forty days; and by sub-sect. (3) the commissioners may issue fresh warrants to collect such arrears within such forty

(*k*) For warrant of commitment, see App. D. (22).

(*l*) See App. D. (19) and (20).

days; and by sub-sect. (4) such fresh warrants may be directed to the collector or to any other person whom the commissioners shall think proper, with authority to levy by distress and sale in the manner directed by the Tax Acts, or this Act, the sums in arrear, together with all costs and expenses attending the said process and the execution thereof; and the sums so levied, after deducting the said costs and expenses, shall be paid to the collector of Inland Revenue, or otherwise as the Board may appoint, and shall be discharged from the schedule.

A tax collector who wishes to demand a tax and levy a distress, is justified in calling in and admitting a constable into the house, and the constable is justified in remaining in the house if the owner threatens an assault (*m*).

It has been held that the 10th section of the Judicature Act, 1875, does not so far assimilate the rules in the winding up of companies to the rules in bankruptcy as to give a collector of taxes a right to distrain on the goods of a company in liquidation (*n*).

Section II.—*Distress for the Enforcement of Orders and Convictions of Justices.*

It only now remains for us to treat upon the mode prescribed by law for the enforcement of orders and convictions of justices.

Power of a justice to issue warrant of distress for recovery of penalty, or compensation on conviction,

Where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the statute authorizing such conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels

(*m*) *Rex* v. *Clark*, 4 L. J. M. C. 92.

(*n*) *Re Regent United Service Stores*, 8 Ch. D. 616.

of the defendant by distress and sale thereof, and also in cases where by the statute in that behalf no mode of raising or levying such penalty, compensation, or sum of money, or of enforcing the payment of the same is stated or provided, the justice or justices making such conviction or order, or any justice of the peace for the same county, may issue his or their warrant of distress (*o*) for the purpose of levying the same (*p*); or may commit the party to prison according to the mode prescribed by the particular statute under which the proceedings may have been taken.

or of sum required to be paid by any order.

In most cases a warrant of distress may be had in the first instance; but under certain Acts, *i. e.*, the Game Act, and the Acts relating to injuries to the person, and malicious injuries to property, the conviction can only be enforced by commitment (*q*). Where distress is required by statute (as under the Licensing Act, 1872), a warrant *must* be issued, notwithstanding the provision of sect. 19 (*r*).

The justices have power to postpone the issuing of such a warrant until such time, and on such conditions, if any, as to the Court may seem just (*s*); but where justices made an order for a warrant of distress to be served on a retired overseer, who had not paid over certain of his accounts on going out of office, and commanded the succeeding overseers to distrain for the balance, and, a doubt being raised whether the balance was correct, the justices ordered the overseers to suspend and not execute the warrant of distress, and the overseers nevertheless distrained; it was held that the justices had no power to suspend the

Power to postpone the issuing of a warrant.

(*o*) For form, see App. D. (1) and (2).

(*p*) 11 & 12 Vict. c. 43, s. 19.

(*q*) Stone's Practice (1882), p. 164.

(*r*) *Supra.* See *R.* v. *JJ. of Newcastle, Ex parte Brown*, 26 W. R. 727; *In re Clew*, 8 Q. B. D. 511; *R.* v. *Paget*, L. R. 8 Q. B. D. 151.

(*s*) 42 & 43 Vict. c. 49, s. 21.

order on account of a doubt as to the correctness of the balance (*t*).

Exemption of wearing apparel, &c.

The wearing apparel and bedding of a person and his family, and the tools and implements of his trade to the value of 5*l.*, are exempt from a distress issued by a Court of summary jurisdiction (*u*).

If the information be dismissed with costs, the costs may be recovered by distress upon the prosecutor, who in default may be committed.

By the 11 & 12 Vict. c. 43, s. 26, it is enacted that "where any information or complaint shall be dismissed with costs, the sum which shall be awarded for costs in the order for dismissal may be levied by distress (*x*) on the goods and chattels of the prosecutor or complainant, and in default of distress or payment such prosecutor or complainant may be committed (*y*) to the house of correction or common gaol, for any time not exceeding one calendar month, unless such sum and all costs and charges of the distress, and of the commitment and conveying of such prosecutor or complainant to prison (the amount thereof being ascertained and stated in such commitment) shall be sooner paid."

The costs must be specified in the order of dismissal.

By sect. 18 of the same statute it is enacted that "the sums so allowed for costs shall in all cases be specified in the order of dismissal." And also "costs specified in a conviction or order of dismissal shall be recoverable in the same manner and under the same warrants as any penalty or sum of money adjudged to be paid in and by such conviction or order is to be recoverable; and in cases where there is no such penalty or sum to be thereby recovered, then such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of such

(*t*) *Barons* v. *Luscombe*, 3 Ad. & Ell. 589.

(*u*) 42 & 43 Vict. c. 49, s. 21, sub-s. 2. See the provisions of the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4.

(*x*) For form, see App. D. (13).

(*y*) For form, see App. D. (14).

distress, by imprisonment, with or without hard labour, for any time not exceeding one calendar month, unless such costs shall be sooner paid" (*z*).

Where there is no order for payment, or the order is that some act shall be done.

And where the conviction orders imprisonment, and not payment of a penalty, or where the order is not for payment of money, but that some act shall be done, and for imprisonment in case of default, the justices may order their warrant of commitment; and where by such conviction or order any sum for costs shall be adjudged to be paid by the defendant to the prosecutor or complainant, such sum may, if the justice or justices think fit, be levied by warrant of distress; and in default of distress, the defendant may, if such justice or justices think fit, be committed for a further term of imprisonment, to commence on the termination of the imprisonment which the offender is already undergoing (*a*).

Committal to prison where distress would be ruinous, or where there are no goods.

By 11 & 12 Vict. c. 43, s. 19, it is enacted that, "whenever it shall appear to any justice of the peace to whom application shall be made for a warrant of distress that the issuing thereof would be *ruinous* to the defendant and his family, or wherever it shall appear to such justice by the confession of the defendant, or otherwise, that he has *no goods or chattels* whereon to levy such distress, then it shall be lawful for such justice, if he shall deem it fit, instead of issuing such warrant of distress, to commit such defendant to the house of correction, or if there be no house of correction within the jurisdiction, then to the common gaol, there to be imprisoned, with or without hard labour, for such time and in such manner as by law such defendant might be so committed in case such warrant of distress had issued, and no goods or chattels could be found whereon to levy such penalty or sum and costs as aforesaid."

(*z*) 11 & 12 Vict. c. 14, s. 18.

(*a*) 11 & 12 Vict. c. 43, s. 24. For forms, see App. D. (8), (9), (10), (11), and (12).

Extension under sect. 21 of the Summary Jurisdiction Act, 1879.

And by sect. 21, sub-sect. 3, of the Summary Jurisdiction Act, 1879 (*b*), "where a person is adjudged by the conviction of a Court of summary jurisdiction, or in the case of a sum not a civil debt by an order of such Court, to pay any sum of money, and on default of payment of such sum a warrant of distress is authorized to be issued, and it appears to the Court of summary jurisdiction, to whom application is made to issue such warrant, that such person has no goods whereon to levy the distress, or that in the event of a warrant of distress being issued his goods will be insufficient to satisfy the money payable by him, or that the levy of the distress will be more injurious to him or his family than imprisonment, such Court, instead of issuing such warrant of distress, may, if it think fit, order the said person on non-payment of the said sum to be imprisoned for any period not exceeding the period for which he is liable under such conviction or order to be imprisoned in default of sufficient distress."

This section is more comprehensive than sect. 19 of the 11 & 12 Vict. c. 43, and must be read in substitution of parts of that section. Such parts of sect. 19 as are inconsistent with this section are repealed by sect. 55.

Defendant may be allowed to go at large.

The justice after issuing the warrant of distress may suffer the defendant to go at large, or order him into custody until a return be made to such warrant of distress, unless he gives security by recognizance.

If he fail to re-appear on his recognizance, the justice may transmit the recognizance to the clerk of the peace, to be proceeded upon in the same way as other recognizances (*c*).

When the warrant is returnable.

The warrant of distress must be made returnable on a day certain; for if no return day is fixed, and the defendant is ordered into custody until such time as the return is made under the above section (*d*), the imprisonment

(*b*) 42 & 43 Vict. c. 49. s. 20.
(*c*) 11 & 12 Vict. c. 43, (*d*) *Ibid.*

would be for an indefinite period, and the justice might be subjected to an action (*e*).

How the warrant shall be backed.

If after delivery of the warrant of distress to the constable to whom the same shall have been directed to be executed, sufficient distress shall not be found within the limits of the jurisdiction of the justice granting such warrant, then, upon proof being made on oath of the handwriting of the justice granting such warrant, before any justice of any other county or place, such justice of such other county or place shall thereupon make an indorsement (*f*) on such warrant, signed with his hand, authorizing the execution of such warrant within the limits of his jurisdiction; by virtue of which said warrant and indorsement the penalty or sum aforesaid, and costs, or so much thereof as may not have been before levied or paid, shall and may be levied by the person bringing such warrant, or by the person or persons to whom such warrant was originally directed, or by any constable or other peace officer of such last-mentioned county or place, by distress and sale of the goods and chattels of the defendant in such other county or place (*g*).

Execution of warrant.

Where an appeal is pending.

Where there is an appeal against the conviction or order, and the appellant is bound by recognizance to prosecute it, the warrant of distress to enforce it should not be issued pending the appeal (*h*). In a case under the statute 42 Geo. III. c. 90, s. 61, which enables a magistrate to make an order for payment of servants' wages in certain cases, and directs that in case of refusal or non-payment of any sum so ordered for twenty-one days after such determination he may issue his warrant of distress, but it gives an appeal to the sessions; it was held that, twenty-one days having elapsed between the making of such order

(*e*) *Per* Coleridge, J., in *Leary* v. *Patrick*, 15 Q. B. 274.

(*f*) For form, see App. D. (3).

(*g*) 11 & 12 Vict. c. 43, s. 19.

(*h*) *Kendall* v. *Wilkinson*, 4 E. & B. 680.

before the appeal, and also twenty-one days after such appeal was dismissed, and before the warrant of distress was issued, the magistrate was justified in issuing such warrant of distress without proof of any demand subsequent to the appeal (*i*). After the hearing of the appeal, and a decision is given in favour of the respondents, the justice may issue a warrant of distress or commitment for execution of the same (*k*).

Requisites of the distress warrant.

By the Summary Jurisdiction Act, 1879 (*l*), s. 39, sub-s. 4, "a warrant of distress is not deemed to be void by reason only of any defect therein, if it be therein alleged that a conviction or order has been made, and there is a good and valid conviction or order to sustain the same."

To whom it should be directed.

As soon as it is issued it should be placed in the hands of the constable to whom it is directed. Where there is no particular police officer, it is directed *generally* to all peace officers in the county or place (*m*).

Procedure on the execution of a distress warrant.

By the 43rd section, sub-sect. 1, of the above Act, the warrant of distress must be executed by or under the direction of a constable.

Duty of the officer.

The officer in whose hands the warrant is placed must proceed as soon as possible to the defendant's premises, and seize such a sufficient quantity of goods as will cover the amount to be levied, as well as the expenses of the levy and sale. He must then remove the goods to a place of safety, or leave a trustworthy person in possession, until the time fixed for the sale (usually five days after the levy) (*n*).

Payment or tender to the constable.

With regard to payment or tender, it is enacted by sect. 28 of the 11 & 12 Vict. c. 43, that in all cases where

(*i*) *Wootten* v. *Harvey*, 6 East, 75.
(*k*) 11 & 12 Vict. c. 43, s. 27.
(*l*) 42 & 43 Vict. c. 49.
(*m*) Stone's Practice (1882), 165.
(*n*) *Ibid.*

any person against whom a distress warrant is issued shall pay or tender to the constable having the execution of the same the sum or sums in such warrant mentioned, together with the amount of the expenses of such distress up to the time of such payment or tender, such constable shall cease to execute the same.

Liability of constables.

Under the statute 24 Geo. II. c. 44, s. 6, which protects an officer acting in obedience to a warrant of justices, and requires that before action is brought a demand of the warrant should be made, an officer who *exceeds* this warrant is not within the protection; therefore, where certain overseers seized the goods of the plaintiff as a distress for poor rates, to a greater amount than was reasonably sufficient to satisfy the sum that was due, it was held that they were liable to an action for an excessive distress without any demand of the warrant (*o*).

By the statute 33 Geo. III. c. 55, s. 1, power is given to justices to impose fines upon constables and other parish officers for neglect of duty, such fines being levied by warrant of distress. An appeal is allowed to the quarter sessions, and if there is no sufficient distress the offenders may be committed.

Calling in constable.

A tax-gatherer who wishes to demand a tax and levy a distress is justified in calling in and admitting a constable into the house, and the constable is justified in remaining in the house, if the owner threatens an assault (*p*).

Where there is not sufficient distress.

If there are no goods upon the premises, or no sufficient goods whereon to levy the amount required, together with costs, the justice before whom the same shall be returned (*q*) is empowered to issue his warrant of commitment (*r*).

(*o*) *Storch* v. *Clarke*, 2 B. & Ad. 113; *Morrell* v. *Martin*, 3 Man. & G. 590.

(*p*) *Rex* v. *Clark*, 4 L. J. M. C. 92.

(*q*) For form of Return, see App. D. (4).

(*r*) 11 & 12 Vict. c. 43, s. 21. For forms, see App. D. (5).

Return of "*nulla bona*."

In order to obtain this warrant, the constable should apprise the complainant of the fact that there is no sufficient distress, and attend with him before the justice. This is called making a return of "*nulla bona*." The constable is put upon his oath, and he then makes a deposition proving that he has attempted to make the levy and that no sufficient goods can be found (*s*). The warrant of commitment is issued as a matter of course, and is under the hand and seal of the justice, directed to the same or any other constable. It recites the conviction or order shortly, the issuing of the warrant of distress, and return thereto, and requires the constable to convey the defendant to the house of correction, or, if there be no such place, to the common gaol (*t*).

What the warrant of commitment contains.

The commitment and period of imprisonment must be in such manner and for such time as is appointed by the statute upon which such commitment or order is founded, unless the sum adjudged to be paid, and the costs of the distress, together with the costs of commitment and conveying of the defendant to prison, if the justice shall think fit so to order (the amount thereof being ascertained and stated in such commitment), shall be sooner paid.

One justice may issue warrants of distress.

One justice may issue a summons or warrant, and may also issue his summons or warrant to compel the attendance of any witnesses, and do all other necessary acts and matters preliminary to the hearing, even in cases where by the statute in that behalf such information or complaint must be heard and determined by two or more justices; and after the case shall have been determined, one justice may issue all warrants of distress or commitment thereon; and it is not necessary that the justice who so acts before or after such hearing shall be the justice or one of the justices by whom the said case shall be determined (*u*).

(*s*) Stone's Practice (1882), p. 165.

(*t*) 11 & 12 Vict. c. 43, s. 21.

(*u*) *Ibid.* s. 29.

Protection to justices.

And in such case the justice who issues the warrant *bonâ fide* is protected from any action *by reason of any defect in such conviction or order*, or for any *want of jurisdiction* in the justice or justices who made the same; such action (if any) shall be brought against the justice or justices who made such conviction or order (*x*). In order to protect justices from an action of trespass for issuing a warrant of distress, all those facts must appear upon the face of the warrant which are necessary to give jurisdiction to the justices in the subject-matter. It was held, therefore, that a warrant of justices under 33 Geo. III. c. 54, s. 15, for distress against the goods of the stewards of a friendly society for refusal by the stewards to pay a certain sum alleged to be due for relief to an individual, who upon oath stated himself to be a member, was defective in not adjudicating that he was a member, that the sum awarded was due, and that the parties against whom the warrant issued were the stewards. The Court would not imply such adjudication from the recital of the information on which the order was made in which any of these facts were asserted (*y*).

Service of summons before issuing distress warrant.

Under some statutes it is necessary before issuing a distress warrant to serve a summons upon defendant requiring him to show cause why such distress warrant should not issue. So where a plaintiff, who was a steward of a society, not having paid money in obedience to an order of two justices under the statute 10 Geo. IV. c. 56, s. 28, the justices *without further summons* issued a distress warrant, under which the plaintiff's goods were seized; it was held that the seizure was not justified by the statute; Denman, C. J., remarking: "It appears to us that if the proceedings are under the 28th section, and the justices have made an order for payment of money analogous to

(*x*) 11 & 12 Vict. c. 44, s. 3. (*y*) *Day* v. *King*, 5 L. J. M. C. 130.

the award of arbitrators under the 27th section, a distress warrant cannot issue for non-compliance with such an order without a previous summons to the party, who may have various reasons to assign against the issuing of the distress warrant. He may not have knowledge of the order; he may be ready to pay the person named in the order, if he could find him; he may actually have tendered or paid the money; all which reasonable excuses would be unavailable if the party to whom the money is ordered to be paid could *ex parte*, and without notice, obtain a distress warrant" (*z*).

Where a demand is not necessary.

If the defendant does not appear to show cause, the proper course is to issue the distress warrant, and not to issue a warrant for his apprehension (*a*). Where the conviction or order adjudges the payment of money only on or before a certain day, or forthwith, a demand is not necessary before issuing the warrant. So where commissioners of highways were empowered to levy certain tolls, and under the statute 3 Geo. IV. c. 121, s. 41, a penalty might be imposed on persons who fraudulently passed through the turnpike without paying, it was held that a demand of the penalty was not necessary under the above section previous to issuing a distress warrant (*b*).

The order for a distress warrant need not be under seal.

It is not necessary that the order should be drawn up under the hand and seal of the justices before issuing the distress warrant; the pronouncing the order is sufficient to justify the issuing of the warrant (*c*).

And a warrant of distress granted by two justices on a conviction for selling spirituous liquors without a licence was held good, though not under the *seals* of the justices;

(*z*) *Hammond* v. *Bendyshe*, 13 Q. B. 869. But see *Peppercorn* v. *Hoffman*, 12 L. J. Ex. 270.

(*a*) *Bessell* v. *Wilson*, 1 E. & B. 489.

(*b*) *Barnes* v. *White*, 14 L. J. M. C. 65; *Ex parte Thomas Brown*, L. R. 3 Q. B. D. 545.

(*c*) *Ratt* v. *Parkinson*, 20 L. J. M. C. 208.

it was held sufficient though under their *hands* only; Willes, C. J., remarking, that "a warrant does not *ex vi termini* imply an instrument under seal; it signifies no more than an authority."

Commitment where statute provides no remedy in default of distress.

In all cases of penalties, convictions, or orders, where the statute provides no remedy in default of distress, the justice may commit the defendant to prison (*d*).

This section is now extended to cases in which it is returned to a warrant of distress, issued under the authority of the above Act for levying any penalty, compensation, or sum of money, adjudged or ordered to be paid by any conviction or order, that no sufficient goods of the party against whom such warrant was issued can be found, where the statute on which the conviction or order is founded provides no mode for raising or levying such penalty, compensation, or sum of money, or for enforcing payment of the same, as well as to cases where the statute on which the conviction, or order, is founded authorizes the issuing thereon of a warrant of distress (*e*). And where the statute does not direct the penalty or sum ordered to be paid to be levied by distress, but directs that there shall be a commitment in case of non-payment, the penalty or sum shall not be levied by distress, but in default of payment the justices shall order the defendant to be committed (*f*); unless the sum or sums adjudged to be paid, and also the costs and charges of taking and conveying the defendant to prison, if such justice or justices shall think fit so to order, shall be sooner paid.

Costs of appeal, how to be recovered.

By sect. 27 of the statute 11 & 12 Vict. c. 43, it is provided, that "If upon an appeal against a conviction or order, the appeal is in favour of the respondents, and the Court of Quarter Sessions orders either party to pay costs,

(*d*) 11 & 12 Vict. c. 43, s. 22.
(*e*) 21 & 22 Vict. c. 73, s. 5.
(*f*) 11 & 12 Vict. c. 43, s. 23. For forms, see App. D. (6) and (7).

such order shall direct such costs to be paid to the clerk of the peace of such Court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay the same shall not be bound by any recognizance conditioned to pay such costs, such clerk of the peace or his deputy, upon application of the party entitled to such costs, or of any person on his behalf, and on payment of a fee of 1*s.*, shall grant to the party applying a certificate (*g*) that such costs have not been paid; and upon production of such certificate to any justice or justices of the peace for the same county, &c., they may enforce the payment of such costs by warrant of distress (*h*), or in default may commit (*i*) the party in manner therein mentioned, unless the sum due for costs shall be sooner paid."

An order giving costs under the statute 12 & 13 Vict. c. 45, s. 5, being recoverable under sect. 27 of 11 & 12 Vict. c. 43, is within the second exception of sect. 4 of the Debtors Act, 1869, and may therefore be enforced by commitment and imprisonment, where the party against whom it is made is not bound by recognizance to pay the costs (*k*).

Mistake in costs.

A mistake in ordering costs to be paid directly to the parties to the appeal, instead of to the clerk of the peace, is a mere defect of form, and will not make the order bad for want of jurisdiction, where the certiorari is taken away (*l*).

Minute of order to be served before

In all cases, where by Act of Parliament authority is given to commit a person to prison, or to levy any sum

(*g*) For form of Certificate, see App. D. (15).

(*h*) For form, see App. D. (16).

(*i*) For form, see App. D. (17).

(*k*) *R.* v. *Pratt*, L. R. 5 Q. B. 176; Stone's Practice (1882), p. 173.

(*l*) *R.* v. *Binney*, 1 E. & B. 810.

upon the goods or chattels by distress, for not obeying any order of a justice or justices, the defendant shall be served with a copy of the minute of such order before any warrant of commitment or distress shall issue in that behalf, and such order or minute shall not form any part of such warrant of commitment or of distress (*m*).

issuing warrant.

Provisions have been made with regard to the sale of a distress by the statute 42 & 43 Vict. c. 49, s. 43.

Sale of distress.

By sub-sect. 2, it is enacted, that "Save so far as the person against whom the distress is levied otherwise consents in writing, the distress shall be sold by public auction, and five clear days at the least shall intervene between the making of the distress and the sale, and where a written consent is given as aforesaid, the sale may be made in accordance with such consent;" and

By public auction.

By sub-sect. 3, "Subject as aforesaid, the distress shall be sold within the period fixed by the warrant, and if no period is so fixed, then within the period of fourteen days from the date of the making of the distress, unless the sum for which the warrant was issued, and also the charges of taking and keeping the said distress, are sooner paid;" and

Time when distress shall be sold.

By sub-sect. 4, "Subject to any directions to the contrary given by the warrant of distress, where the distress is levied on household goods, the goods shall not, except with the consent in writing of the person against whom the distress is levied, be removed from the house until the day of sale, but so much of the goods shall be impounded as are in the opinion of the person executing the warrant sufficient to satisfy the distress, by affixing to the articles impounded a conspicuous mark; and any person removing the said mark shall on summary conviction be liable to a fine not exceeding 5*l.*;" and

Removal of household goods.

By sub-sect. 5, "Where a person charged with the exe-

Wrongful

(*m*) 11 & 12 Vict. c. 43, s. 17.

retainer of produce.

cution of a warrant of distress wilfully retains the produce of any goods sold to satisfy the distress, or otherwise exacts any greater costs and charges than those to which he is for the time being entitled by law, or makes any improper charge, he shall be liable on summary conviction to a fine not exceeding 5*l.*;" and

Account of costs and charges.

By sub-sect. 6, "A written account of the costs and charges incurred in respect of the execution of any warrant of distress shall be sent by the constable charged with the execution of the warrant as soon as practicable to the clerk of the Court of summary jurisdiction issuing the warrant; and it shall be lawful for the person upon whose goods the distress was levied, within one month after the levy of the distress, to inspect such account without fee or reward at any reasonable time to be appointed by the Court, and to take a copy of such account;" and

Deduction of costs and charges of sale.

By sub-sect. 7, "A constable charged with the execution of a warrant of distress shall cause the distress to be sold, and may deduct out of the amount realised by such sale all costs and charges actually incurred in effecting such sale, and shall render to the owner the overplus, if any, after retaining the amount of the sum for which the warrant was issued, and the proper costs and charges of the execution of the warrant;" and

Payment or tender.

By sub-sect. 8, "Where a person pays or tenders to the constable charged with the execution of a warrant of distress the sum mentioned in such warrant, or produces the receipt for the same of the clerk of the Court of summary jurisdiction issuing the warrant, and also pays the amount of the costs and charges of such distress up to the time of such payment or tender, the constable shall not execute the warrant."

Execution of warrant of distress of English Court

By the statute 44 & 45 Vict. c. 24, s. 5, it is provided, "that a warrant of distress issued in England, when indorsed in pursuance of this Act, shall be executed, in

Scotland, as if it were a Scotch warrant of poinding and sale, and a Scotch warrant of poinding and sale, when indorsed in pursuance of this Act, shall be executed, in England, as if it were an English warrant of distress, and the enactments relating to the said warrants respectively shall apply accordingly, except that any account of the costs and charges in connection with the execution, or of the money levied thereby, or otherwise relating to the execution, shall be made, and any money raised by the execution shall be dealt with in like manner as if the warrant had been executed within the jurisdiction of the Court issuing the warrant."

APPENDIX A.

FORMS OF PROCEEDINGS IN DISTRESS.

(1). *Warrant to distrain in a House for Rent.*

To Mr. R. S., my bailiff.

I hereby authorize and require you to distrain the goods and chattels in and upon the [house] and premises of C. D., situate and being [No. , street], in the parish of , in the county of , for £ , being quarter's rent, due to me for the same [at Lady-day, Midsummer-day, Michaelmas-day, *or* Christmas-day last, *as the case may be; or* "on the day of last"]; and to proceed thereon for the recovery of the said rent as the law directs. But you are hereby expressly prohibited from taking any property not legally liable to a distress for rent.

Dated this day of , 18 .

(Signed) A. B. of
[*or* A. B. of
by P. Q., his agent].

(2). *Warrant to distrain on a Farm for Rent.*

To Mr. R. S., my bailiff.

I hereby authorize and require you to distrain the goods and chattels [and also the cattle and growing crops], in and upon the farm, lands and premises of C. D., situate and being at in the parish, &c. [as in No. 1, to the end].

(3). *Inventory of Goods distrained.*

An inventory of the goods and chattels [cattle and growing crops] distrained by [R. S., of , as bailiff of and for] A. B., of , Esquire, on the day of , 18 , in and upon the [house *or* farm, lands and] premises of C. D., situate and being [No. , street] in the parish of , in the county of , for £ , being quarter's rent due to the said A. B. [at last; *or* "on the day of last"].

1. *In front room on ground floor.*—One dining table, one side-board, twelve chairs [*describe each article in this room intended to be distrained*].

2. *In back room on ground floor.*—[*Here describe each article in this room intended to be distrained.*]

3, 4, 5, &c.—[*Here describe in like manner each article intended to be distrained in the "front room on first floor"—"back room on first floor"—"front room on second floor"—"back room on second floor," &c.—"front attic"—"back attic"—"front kitchen"—"back kitchen"—"washhouse"—"scullery"—"wine cellar"—"coal cellar"—"yard"—"garden"—"coach-house"—"stables"—"barns," &c., &c.*]

(4). *In the Fields.*

1. *In the field or close called or known as "Greenacre:"* cows, calves, oxen, bulls, sheep, lambs, horses, mares, geldings, colts, fillies, pigs, [*as the case may be*].

2. *In the field or close called or known as* [*name*]: haystacks, stacks of [wheat]; about acres (more or less) of growing crops of [wheat *or* barley, oats, potatoes, peas, beans, *as the case may be*].

3. *Describe in like manner each close and the articles therein intended to be distrained.*

At the end of the list may (if wished) be added the following words, or to the like effect, viz.:—

"And all other goods, chattels and effects on the said premises," *or* "and any other goods that may be found in and

about the said premises to pay the said rent and expenses of this distress." *But it would be too indefinite and incorrect to say,* "And all other goods, chattels and effects on the said premises *that may be required in order to satisfy* the above rent, together with all necessary expenses."

Dated this day of , 18 .

(Signed) R. S., bailiff of the said A. B.
[*or* A. B. of].

(5). *Notice of Distress for Rent.*

To Mr. C. D., and all others whom it may concern.

Take notice that I [R. S., as bailiff of and for A. B., Esq., your landlord] have this day distrained on the premises in your occupation or possession, named in the inventory [above written, *or* hereunto annexed], the [cattle], goods, and chattels mentioned in the said inventory for £ , being quarter's rent due to [me *or* the said A. B.], at last [*or* on the day of last], for the said premises. And unless you pay the said rent, with the charges of distraining for the same within five days from the service hereof, the said [cattle] goods and chattels will be appraised and sold according to law. [*If cattle or goods removed, mention the place thus:* "And take notice, that the said cattle have been removed to and are now in the common pound in and for the parish of , in the county of .]

Dated this day of , 18 .

(Signed) R. S., of ,
Bailiff of the above-named A. B.
[*or* A. B. of].

(6). *Notice of Distress of Growing Crops, &c.*

To Mr. C. D., and all others whom it may concern.

Take notice that I [R. S., as bailiff of and for A. B., Esq., your landlord], have this day distrained on the [farm, lands

and] premises in your occupation or possession, mentioned in the inventory [above written *or* hereunto annexed], the [cattle, goods and chattels, and also the] growing crops mentioned in the said inventory for £ , being quarter's rent due to [me *or* the said A. B.], at last [*or* on the day of last] for the said [farm, lands and] premises: And unless you pay the said rent, with the charges of distraining for the same [within five days from the date hereof, the said cattle, goods and chattels will be appraised and sold according to law, and] I shall [*or* if signed by the bailiff say, "the said A. B. will"] proceed to cut, gather, make, cure, carry and lay up the said crops, when ripe, in the barn or other proper place on the said premises, and in convenient time sell and dispose of the same in or towards satisfaction of the said rent, and of the charges of such distress, appraisement and sale, according to law.

Dated this day of , 18 .

(Signed) A. B. of
[*or* R. S. of
Bailiff of the above-mentioned A. B.]

(7). *Request of a Tenant to his Landlord to withdraw a Distress for Rent, with liberty to make a second Distress.*

To A. B., Esq.

Sir,—I hereby request you, for my accommodation, to withdraw the distress for rent made by you on the [farm, land and] premises, situate at , in the county of , now in my occupation as your tenant: And in consideration of your so doing, I do hereby consent, promise and agree that it shall and may be lawful for you at any time [afterwards, *or* after the day of next] to make a second distress for the said rent, or for so much thereof as shall for the time being remain unpaid, and for the expenses of and incident to such second distress: [And I will also pay you on demand all expenses incurred of and incident to the said first distress to

the time of its being withdrawn for my accommodation as aforesaid].

Dated this day of , 18 .

Yours, &c.,

Witness, E. F., of . C. D.

(8). *Request of Tenant to the Landlord or his Bailiff to remain in possession under a Distress for more than five days* (*a*).

To A. B., Esquire [*or* to Mr. R. S., bailiff of A. B., Esquire].

Sir,—Pursuant to sect. 6 of the Law of Distress Amendment Act, 1888, I hereby request you not to remove the goods and chattels which you have distrained and impounded for rent on the premises situate at , in the county of , now in my occupation as [your tenant, *or* tenant of the said A. B.]; but to keep the said goods and chattels in the place where they are now impounded until the day of next inclusive, for my accommodation, and to give me the opportunity of obtaining money to pay the said arrears of rent with expenses of the distress; and I also agree to give security for any additional cost that may be occasioned by such extension of time.

Dated this day of , 18 .

Witness, E. F., of . Yours, &c.,

C. D.

(9). *Notice by the Tenant or Owner of the Goods distrained requiring an Appraisement to be made* (*b*).

To A. B., Esquire [*or* to Mr. R. S., bailiff of A. B., Esquire].

Sir,—Pursuant to sect. 5 of the Law of Distress Amendment Act, 1888, I hereby require you to cause an appraisement to be made of the goods and chattels which you have distrained and impounded for rent on the premises situate at , in the county of , now in my occupation as your tenant [*or*

(*a*) See 51 & 52 Vict. c. 21, s. 6. For request to sell within the extended time, see Form No. 22.

(*b*) 51 & 52 Vict. c. 21, s. 5.

now in the occupation of your tenant, of which goods I am the owner], and I require you not to sell such goods and chattels without such appraisement.

Dated this day of , 18 .

Yours, &c.,
C. D.
[*or* E. F.]

(10). *Notice by the Tenant or Owner of the Goods distrained requiring them to be removed to a public Auction Room* (*c*).

To A. B., Esquire [*or* to Mr. R. S., bailiff of A. B., Esquire].

Sir,—Pursuant to sect. 5 of the Law of Distress Amendment Act, 1888, I hereby require you to remove the goods and chattels which you have distrained and impounded for rent on the premises situate at , in the county of , now in my occupation as your tenant [*or* now in the occupation of your tenant, of which goods I am the owner] to a public auction room, or to [*here specify some other fit and proper place*] in order that the said goods may be there sold.

Dated this day of , 18 .

Yours, &c.,
C. D.
[*or* E. F.]

(11). *The Appraisement.*

We, the above-named L. M. and N. O., having viewed the [cattle], goods and chattels mentioned in [this *or* the within written] inventory, do appraise and value the same at the sum of pounds shillings and pence (*d*),

£ *s.* *d.*

As witness our hands the day of , 18 .

(Signed) L. M. }
N. O. } Appraisers.

(*c*) 51 & 52 Vict. c. 21, s. 5.

(*d*) The amount must be written out in words and figures upon duly stamped material.

(12). *Notice to Sheriff under* 8 *Anne, c.* 14, *s.* 1, *of Rent due to Landlord of Execution Debtor.*

To the sheriff of the county of , and his under sheriff and bailiffs, and all others whom it may concern:

Take notice, that the sum of £ is now due and owing to [me *or* to J. K., of , Esquire], from C. D., of , in the county of , for [one year's, *or* one half-year's, *or* one quarter's] rent due on the day of last, of the premises in his occupation at aforesaid; upon which premises, as I am informed, you have seized and taken in execution certain goods and chattels; and you are hereby required not to remove any of the said goods and chattels from off the said premises until the said arrears of rent are paid, pursuant to the statute in such case made and provided.

Dated this day of , 18 .

Yours, &c.,
J. K. of ,
[*or* E. F. of , Agent for J. K. of , Esquire].

(13). *Notice from Sheriff to Execution Creditor of Rent being due from the Defendant, and requiring Payment thereof by such Creditor, pursuant to* 8 *Anne, c.* 14, *s.* 1.

In the High Court of Justice.
Division.

Between A. B., plaintiff,
and
C. D., defendant.

Take notice, that the sum of £ is due and owing from the above-named defendant to his landlord J. K., of , [&c., Esquire], for [one year's, *or* one half-year's, *or* one quarter's] rent, due on the day of last, for and in respect of the [house *or* farm, land, and] premises situate at , in the county of , now in the occupation of the

said defendant, and upon which certain goods and chattels have been seized by the sheriff of shire under the writ of *fieri facias* issued in this action [and the said sheriff has had notice of such arrears of rent]: Now I do hereby, as the agent of the said sheriff and on his behalf, give you notice that unless the above-named plaintiff do forthwith pay the arrears of rent due to the said landlord, either to him or to his bailiff pursuant to the statute in such case made and provided, the said sheriff will withdraw from possession of the said goods and chattels under the said writ.

Dated this day of , 18 .

Yours, &c.,

L. M. of ,

Agent for the sheriff of shire.

To the above-named plaintiff, and to

Mr. , his solicitor or agent.

(14). *Notice to the High Bailiff of a County Court, pursuant to* 51 & 52 *Vict. c.* 43, *s.* 160.

To the high bailiff of the County Court of , holden at , and to his bailiff and officers, and all others whom it may concern:

Take notice, that C. D., whose goods you have taken in execution under a warrant from the said County Court, holds the [house *or* apartments] in which the said goods were taken as tenant thereof to [me *or* to J. K., of , Esq.] under a lease for years [and three-quarters of another year wanting five days] from the day of , 18 , *or* under a tenancy from year to year, from the day of last, *or* under a tenancy from month to month from the [*first*] day of each month, *or* under a tenancy from week to week from each [*Saturday*], at the yearly rent of £ , payable [by equal half-yearly or quarterly payments, on the day of , &c., *state days of payment*], *or* at the monthly rent of £ payable [in advance] on the day of each month, *or* at the weekly rent of £ payable [in advance] on each [*Saturday*]: And I now [as the agent of

and for the said J. K., and on his behalf,] claim the sum of £ for arrears of the said rent for one year [*or* two quarters] ending on the day of last, *or* for two months [*or* four weeks] ending on the day of last, *as the case may be*, which said rent or sum of £ now remains in arrear and unpaid.

Dated this day of , 18 .

(Signed) J. K., of ,
[*or* C. D., of ,
Agent for the above-named J. K.]

(15). *Declaration by Lodger* (*e*).

To [*name of superior landlord, or his bailiff, as the case may be*].

Sir,—I, , of , do hereby declare that [*name of immediate tenant*] has no right of property or beneficial interest in the furniture, goods and chattels, of which an inventory is hereunto annexed, but that such furniture, goods and chattels are my property [*or* in my lawful possession]. I owe [*name of immediate landlord*] £ on account of rent from to .

The inventory referred to in this declaration is as follows:—

(16). *Inventory*.

1 Pianoforte,
4 Sofas,
2 Timepieces, &c., &c. [*state articles with precision*].

To Yours, &c.,
A. B.

(*e*) See *Sharpe* v. *Fowle and Young*, 12 Q. B. D. 385, and *Ex parte Harris*, 16 Q. B. D. 130, *ante*, p. 162.

(17). *General Certificate* (*f*).

[Date.]

In the County Court of , holden at .

Pursuant to section seven of the Law of Distress Amendment Act, 1888, I hereby authorise A. B., of , to act as a bailiff to levy distresses for rent in England and Wales.

Signed

(L.S.)

Judge.

(18). *Special Certificate* (*f*).

[Date.]

In the County Court of , holden at .

Pursuant to section seven of the Law of Distress Amendment Act, 1888, I hereby authorise A. B., of , to act as a bailiff to levy a distress on the premises of C. D. of , for rent alleged to be due to E. F. of .

Signed

(L.S.)

Judge.

or Registrar.

(19). *Form of Statement of Claim for Excessive Distress.*

The plaintiff has suffered damage by the defendant wrongfully distraining for arrears of rent of 180, Leather Lane, of which the plaintiff was tenant to the defendant, goods of the plaintiff of greater value than the said arrears and charge of the said distress and appraisement and sale of the goods, although part of the said goods was of sufficient value to satisfy the same, and thereby took an excessive distress, contrary to the statute in that behalf.

The plaintiff claims £— —.

Place of trial,

(Signed)

Delivered the day of , 18 .

(*f*) See 51 & 52 Vict. c. 21. s. 7.

(20). *Ditto for not selling for the best Price.*

1. The plaintiff was tenant to the defendant of at a rent payable by the plaintiff to the defendant.

2. The defendant seized and sold goods of the plaintiff as a distress for rent of the said premises in arrear.

3. The defendant did not sell the same for the best price that could have been gotten for the same, contrary to the statute in that behalf.

Particulars of special damage :—	£	*s.*	*d.*
Goods might have been sold for £——			
Sold for £—— - - - - - - - - -			
Loss - - - - - - - - - - - - -			

The plaintiff claims £——.

Place of trial, . (Signed)

Delivered the day of , 18 .

(21). *Ditto for distraining twice for the same Rent.*

The plaintiff has suffered damage by the defendant wrongfully distraining the goods and chattels of the plaintiff for arrears of rent of the Home Farm, alleged to be due to the defendant, after having already on a former occasion distrained goods of the plaintiff for the same rent sufficient to satisfy the said alleged arrears of rent and the costs and expenses of the distress.

Particulars of special damage :—

(*Fill in.*)

The plaintiff claims £——.

Place of trial, (Signed)

Delivered the day of , 18 .

(22). *Request and consent of Tenant to Sell within extended Time.*

To A. B., of , and to C. D., of , his bailiff.

I, the undersigned G. H., of , hereby request you to sell [*or* consent to your selling] the goods and chattels [*if only part of the goods are to be sold, specify such part, and say,* "being part of the goods and chattels,"] in and upon the said premises situate at , and which you have distrained for rent, at any time before the expiration of the extended period for which I applied during which I might replevy the same.

Witness, M., &c.

Dated the day of , 18 .

G. H.

APPENDIX B.

FORMS OF PROCEEDINGS ON A REPLEVY.

(1). *Notice of proposed Sureties.*

Take notice, that the sureties whom I propose as my security in the above action [*here state the proceeding which has rendered the sureties necessary*] are [*here state the full names and additions of the sureties, whether housekeepers or freeholders, and their residences for the last six months, therein mentioning the county or city, places, streets and numbers, if any*].

Dated this day of , 18 .

To the (*a*)

(2). *Notice to Distrainor of Goods* [or *Cattle*] *intended to be replevied* (*b*).

In the County Court of , holden at .

Take notice, that A. B., of, &c., whose goods [*or* cattle] you have distrained, intends to replevy the same, and has proposed as his sureties for the due prosecution of an action of replevin against you in the [*here mention the Court in which the action is to be brought*], E. F., of, &c., and G. H., of, &c., and that if you have any valid objection to make to the proposed sureties, or either of them, you must attend at [*here insert place of office of registrar*], on the day of , 18 , at the hour of , when the bond will be submitted to me for approval.

J. K., Registrar of the Court.

(*a*) County Court Rules, 1889, Form 120. By Ord. LI. r. 24 of these rules, all proceedings and documents shall be in forms similar to the forms in the Appendix where the same are applicable; and in cases where no forms are provided parties shall frame the proceedings or documents, using as guides those contained in the Appendix. And by rule 27 of this order no matter shall be added to or taken from any form in the Appendix.

(*b*) *Ibid.*, Form 243.

(3). *Affidavit of Justification* (*c*).

I, , of , one of the sureties for the [defendant] make oath and say, That I am a housekeeper [*or* freeholder, *as the case may be*], residing at [*describing particularly the county or city, the street or place, and the number of the house, if any*]: That I am worth property to the amount of £ [*the amount required by the practice of the Court*] over and above what will pay my just debts [*if security in any other action or for any other purpose, add,* and every other sum for which I am now security]: That I am not bail or security in any other action or proceeding, or for any other person [*or if security in any other action or actions, add,* except for C. D., at the suit of E. F., in the Court of , in the sum of £ , for G. H., at the suit of I. K., in the Court of , in the sum of £ , *specifying the several actions, with the Courts in which they are brought, and the sums in which he has become bound*]; that this my property to the amount of the said sum of £ [*and if security in any other action, &c.*, over and above all other sums for which I am now security as aforesaid], consists of [*here specify the nature and value of the property in respect of which the deponent proposes to become bondsman, as follows:* stock-in-trade in my business of , carried on by me at , of the value of £ , of good book debts owing to me to the amount of £ , of furniture in my house at of the value of £ , of a freehold [*or* leasehold] farm of the value of £ , situate at , occupied by , *or* of a dwelling-house of the value of £ , situate at , occupied by , *or of other property, particularizing each description of property, with the value thereof*], and that I have for the last six months resided at [*describing the place of such residence, or if he has had more than one residence during that period, state in the same manner as above directed*].

(4). *Bond in Replevin where Action to be commenced in High Court of Justice* (*d*).

[*Form of Bond as post, No.* 7, *to the date inclusive:*] Whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, and this security has been approved of by the registrar of the County Court of , holden at , as appears by his allowance in the margin hereof:

Now the condition of this obligation is such, that if the

I approve of this bond.
J. K.,
(L.S.) Registrar.
This bond does not require a stamp.

(*c*) County Court Rules, 1889, Form 121. (*d*) *Ibid.*, Form 244.

above-bounden A. B. do and shall within one week from the date of the said obligation commence an action of replevin against the above-named G. H. in the High Court of Justice, for taking and unjustly detaining of certain goods and chattels of the said , to wit [*here insert the description of the goods and chattels*], and prosecute such action with effect and without delay, and, unless judgment be obtained thereon by default, do and shall prove before the said Court of , that he the said had good ground for believing that the title to the hereditament in respect of which the distress was made was in question [*or* that the title to a toll was in question] [*or* that the title to a market was in question] [*or* that the title to a fair was in question] [*or* that the title to a franchise was in question] [*or* that the alleged rent or damage in respect of which the distress was made exceeded twenty pounds], and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

Signed, sealed and delivered by the above bounden in the presence of } A. B. (L.S.) C. D. (L.S.) E. F. (L.S.)

Note:—If a deposit of money be made, the memorandum thereof should follow the terms of the conditions of the bond, and will not require a stamp. The following form will serve as a guide.

51 & 52 Vict. c. 43, s. 109.

(5). *Memorandum of Deposit* (*e*), *where the Action of Replevin is to be brought in the High Court.*

Memorandum made on the day of 18 : Whereas A. B., of , has this day deposited with J. K., registrar of the County Court of , holden at , the sum of £ , pursuant to 19 & 20 Vict. c. 108, s. 71 :

(*e*) This form is pursuant to 19 & 20 Vict. c. 108, s. 71.

Now the condition of the said deposit is such, that if the said A. B. do and shall within one week from the date of this memorandum commence an action of replevin against C. D., of [and R. S., of], in her Majesty's High Court of Justice, for taking and unjustly detaining of certain goods and chattels of the said A. B., to wit [*here insert the description of the goods and chattels intended to be replevied*], and prosecute such action with effect and without delay, and, unless judgment be obtained thereon by default, do and shall prove before the said Court of , that he the said A. B. had good ground for believing [that the title to the hereditament in respect of which the distress was made was in question; *or* that the title to a toll was in question; *or* that the title to a market was in question; *or* that the title to a fair was in question; *or* that the title to a franchise was in question; *or* that the alleged rent or damage in respect of which the distress was made exceeded twenty pounds], and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then the said deposit shall be void and returned to the said A. B., otherwise the same shall be applied and disposed of according to law.

I approve of this memorandum.
J. K.,
(L.S.) Registrar.

(Signed) A. B.
[*or* A. B. by E. F.,
his attorney.]

(6). *Bond in Replevin, where Action to be commenced in County Court* (*f*).

Know all men by these presents, that we, A. B., of, &c., C. D., of, &c., and E. F., of, &c., are held and firmly bound unto G. H.,* of, &c., in £ , to be paid to the said G. H., or his certain attorney, executors, administrators, or assigns, for which payment to be made we bind ourselves, and each and every of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

* The distrainor.

Sealed with our seals, and dated this day of , 18 .

(*f*) County Court Rules, 1889, Form 245.

I approve of this bond.
J. K.,
(L.S.) Registrar.
This bond does not require a stamp.

Whereas the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, and this security has been approved of by , the registrar of the County Court of , holden at , as appears by his allowance in the margin hereof:

Now the condition of this obligation is such, that if the above-bounden A. B. do and shall within one month from the date of the said obligation commence an action of replevin against the above-named G. H. in the County Court of , holden at , for taking and unjustly detaining of certain goods and chattels of the said , to wit [*here insert the description of the goods and chattels*], and prosecute such action with effect and without delay, and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

Signed, sealed and delivered by the above-bounden in the presence of } A. B. (L.S.) C. D. (L.S.) E. F. (L.S.)

Memorandum of deposit in lieu of bond.

Note.—If a deposit of money be made, the memorandum thereof should follow the terms of the conditions of the bond, and will not require a stamp. The following form will serve as a guide.

(7). *Memorandum of Deposit* (*g*), *where the Action of Replevin is to be brought in the County Court.*

Memorandum made on the day of , 18 : Whereas A. B., of , has this day deposited with J. K., Esq., registrar of the County Court of , holden at , the sum of £ , pursuant to 19 & 20 Vict. c. 108, s. 71: Now the condition of the said deposit is such,

(*g*) This form is given by 19 & 20 Vict. c. 108, s. 71.

that if the said A. B. do and shall, within one month from the date of this memorandum, commence an action of replevin against C. D., of [and R. S., of], in the County Court of , holden at , for taking and unjustly detaining of certain goods and chattels of the said A. B., to wit, [*here insert the description of the goods and chattels intended to be replevied*], and prosecute such action with effect and without delay, and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then the said deposit shall be void and returned to the said C. D., otherwise the same shall be applied and disposed of according to law.

(Signed) A. B.
[*or* A. B., by E. F., his attorney].

(8). *Notice by Registrar of Day and Hour upon which Bond to be executed* (*h*).

Take notice, that I have appointed the day of , 18 , at o'clock in the forenoon, at my office, for the and his sureties to execute the bond proposed to be given in the above action.

(*To be added to notice to obligee:*—And further take notice, that if you have any valid objection to make to the sureties, or either of them, such objection must then be made.)

Dated this day of , 18 .

To the plaintiff (*or* defendant).

Registrar of the Court.

(*h*) County Court Rules, 1889, Form 122.

(9). *Statement of Particulars on entering Plaint in Replevin* (*i*).

No. of Plaint .

In the County Court of , holden at .

Between A. B., plaintiff,
and
C. D., defendant.

(Seal.)

Date.	
18 . May.	The plaintiff complains that you, on the day of , in (*a certain dwelling-house*) called (*Elm Grove*), took the goods of the plaintiff, and unjustly detained the same against sureties and pledges until, &c., whereby the plaintiff has sustained damages.

The following are the goods so taken:—

	£	s.	d.
One mahogany table - - -			
One eight-day clock - - -			
Six silver spoons - - - -			
Damages for the unlawful taking and detention of the above - - - - - - - -	20	0	0

(10). *Writ of Second Deliverance.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To the sheriff of , greeting: If A. B. shall make you secure of prosecuting his claim, and also of returning the [cattle goods, chattels, &c.] which were lately adjudged to C. D. in our High Court of Justice on account of the default of the said A. B., if a return thereof shall be adjudged, We command you that if by virtue of our writ of *retorno habendo* to

(*i*) This form is taken from Pitt-Lewis' County Court Practice, 2nd ed., p. 791.

you thereupon before directed, you have caused the said [cattle, &c.] to be returned to the said C. D., then that you cause them to be re-delivered to the said A. B., and put by gages and safe pledges of the said C. D., that he be before our said High Court of Justice, on [*the return day of the writ*], to answer the said A. B. in an action of replevin for the taking and unjustly detaining the [cattle, goods, and chattels] aforesaid, and have you there the names of the pledges and this writ. Witness ourself the day of , in the year of our reign.

(11). *Return to Writ of Second Deliverance.*

By virtue of this writ to me directed, I have caused to be delivered to the within-named A. B. his [cattle, goods, and chattels] within mentioned as I am within commanded. The pledges within mentioned are and .

The answer of , Esq., sheriff.

(12). *The like, where only part of the Goods, &c., could be delivered.*

By virtue of this writ to me directed, I have caused to be delivered to the within-named A. B. [*describe the goods re-delivered*], part of the [cattle, goods, and chattels] within mentioned, being all of the said [cattle, goods, and chattels] which are to be found in my bailiwick. The pledges within mentioned are and .

The answer of , Esq., sheriff.

(13). *Warrant to High Bailiff to replevy* (*k*).

In the County Court of , holden at .

Whereas hath given security as well to commence his action of replevin against for the taking and unjustly detaining of certain goods and chattels [*or* cattle] of the said

(*k*) County Court Rules, 1889, Form 246.

, that is to say: and prosecute such action with effect and without delay, as also to return the said goods and chattels, if return thereof shall be adjudged by law: Now, as registrar of the said County Court, and by virtue of the provisions of the County Courts Act, 1888, I hereby authorize and direct you without delay to replevy and deliver the said goods and chattels [*or* cattle] to the said , and forthwith to return to me this warrant, and what you shall have done under the same.

Dated the day of , 18 .

Registrar of the Court.

To the High Bailiff of the Court.

In obedience to this warrant I have replevied and caused to be delivered to the within-named the within-mentioned goods and chattels [*or* cattle].

Dated this day of , 18 .

High Bailiff.

(14). *Judgment for Plaintiff in Replevin for Rent* (*l*).

Acknowledgment of payment into Court.				
Date.	£	*s.*	*d.*	Received by

It is this day adjudged that the plaintiff do recover against the defendant the sum of £ for debt [*or* damages], and £ for costs, amounting together to the sum of £ .

And it is ordered that the defendant do pay the same to the Registrar of the Court on the day of [*or* by instalments of for every days; the first instalment to be paid on the day of , 18 .]

[*Where the defendant is a married woman, add:*—

And it is further ordered that execution upon this judgment be limited to the separate property of the defendant not subject to any restraint against anticipation, unless by reason of sect. 19 of the Married Women's Property Act, 1882, such property shall be liable to execution notwithstanding such restriction.]

[In case default be made in payment of any one of such

(*l*) County Court Rules, 1889, Form 34. See also 34 (A).

instalments, and execution issue, it shall be for the whole of the above amount then remaining due.]

This form will, by striking out the words within brackets, or the words "on the day of" in line 8, apply to judgments of payment, whether for payment forthwith of the whole claim or by instalments, and to judgments under sect. 99 of the County Courts Act, 1888, and also to judgments in replevin, where the judgment is for the plaintiff.

(15). *Judgment for Defendant in Replevin for Rent* (*m*).

Upon hearing this action at a Court holden this day, it is adjudged that the plaintiff do return to the defendant, the goods and chattels [*or* cattle, *stating the particulars thereof*], and pay to the registrar of the Court forthwith [*or* on the day of] the sum of £ for costs of suit; [*or*, It is adjudged that the amout due for rent in arrear from the plaintiff to the defendant is £ , and that the goods and chattels [*or* cattle] were of the value of £ ; and that the plaintiff do forthwith [*or* on the day of] pay to the registrar of the Court, at his office, the said sum of £ , and also the sum of £ for costs of suit.]

(16). *Judgment for Defendant in replevin of Cattle damage feasant* (*n*).

Upon hearing this action at a Court holden this day, it is adjudged that the plaintiff do return to the defendant the cattle [*here specify the cattle*], *or* do pay to the registrar of this Court forthwith [*or* on the day of , 18], the sum of £ , which is now adjudged to be the amount of damage sustained by the defendant.

It is also adjudged that the plaintiff do pay to the registrar of the Court on the day and year aforesaid, the sum of £ for costs.

(*m*) County Court Rules, 1889, Form 247.
(*n*) *Ibid.*, Form 248.

FORMS IN ACTIONS OF REPLEVIN REMOVED FROM THE COUNTY COURT INTO THE HIGH COURT.

(17). *Affidavit for Certiorari.*

In the High Court of Justice.

I, C. D., of , in the county of [*trade or addition*], make oath and say as follows :—

1. On the day of [instant *or* last] I was served with a summons issued out of the County Court of , holden at , with particulars of demand thereto annexed; and the paper writing hereto annexed, marked A, is a true copy of the said summons; and the paper writing hereto annexed, marked B, is a true copy of the said particulars of demand.

2. I am the defendant named in the said summons and particulars.

3. I have good ground for believing, and do verily believe, that the rent [*or* "damage"] in respect of which the distress mentioned in the said summons and particulars was made exceeded 20*l.*

4. [*Here state the facts, showing the ground of belief above mentioned*, ex. gr. :] The plaintiff A. B., in the said summons and particulars named, for quarters of a year next before and ending on the day of last, held a certain [dwelling-house *or* farm, lands] and premises, situate at , in the parish of , in the county of , wherein the said distress was taken, as my tenant at the annual rent of pounds, payable [quarterly on the usual quarter days, *or as the case may be*], of which rent the sum of £ , for [two] quarters ending on the day of last, became and was due to me from the said A. B., and [the sum of £ , parcel thereof (the residue having been paid)] continued in arrear and unpaid at the time of the making of the said distress [*or state facts showing that the "damage done" exceeded* 20*l.*].

5. I am desirous of having the said action removed by certiorari from the County Court of , holden at , into her Majesty's High Court of Justice; and I am ready

and willing to give such security as is required by the statute in such case made and provided.

Sworn, &c. C. D. (*o*).

(18). *The Like, when some Title is in Question.*

[*Commence as ante, No.* 18, *to the end of the second paragraph.*]

3. [*Here state the facts specially, showing that the title to some particular hereditament, toll, market, fair, or franchise, is in question.*]

4. I have good ground for believing, and do verily believe, that the title to the said was and is in question.

5. I am desirous [*&c., as in last form*].

Sworn, &c. C. D.

(19). *Judge's Order for a Certiorari to remove an Action of Replevin* (*p*).

Upon reading the affidavit of , I do order that a writ of certiorari do issue to remove an action of replevin between A. B. and C. D., with all things touching the same, from the County Court of , holden at , into her Majesty's High Court of Justice, on the said C. D. giving security as provided for by the 51 & 52 Vict. c. 43, s. 137.

Dated the day of , 18 .

[*Judge's signature.*]

(20). *Bond on Removal* (*q*).

[*Form of bond by the defendant and two sureties in a penalty not exceeding* 150*l.*, *as ante, No.* 7, *to the date, inclusive:*]

Whereas an action of replevin was on the day of , 18 , commenced in the County Court of , holden at , wherein A. B. was plaintiff, and the

(*o*) See also Chitty's Forms, 12th ed., p. 629.
(*p*) See *ibid.*, p. 630.
(*q*) See *ibid.*, p. 631.

above-bounden C. D. was defendant: And whereas the Honorable Sir , knight, one of the judges of her Majesty's High Court of Justice [*or*, "And whereas her Majesty's High Court of Justice"], on the application of the said C. D., did, on the day of , 18 , order that [*recite order for certiorari in the past tense*, ex. gr.:] "a writ of certiorari should issue to remove the said action of replevin between the said A. B. and C. D., with all things touching the same, from the said County Court of , holden at , into her Majesty's High Court of Justice, on the said C. D. giving security as provided for by the 51 & 52 Vict. c. 34, s. 137:" And whereas the above-named E. F. and G. H., at the request of the said C. D., have agreed to enter into the above-written obligation as his sureties: Now the condition of this obligation is such, that if the above-bounden C. D. do defend the said action in Her Majesty's High Court of Justice with effect, and, unless the said A. B. shall discontinue or shall not prosecute such action or become nonsuit therein, if the said C. D. do prove before the said High Court that the said C. D. had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that the rent or damage in respect of which the distress in this behalf was taken exceeded twenty pounds, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

I approve of this bond.
W. B.,
Master.

Signed, sealed and delivered by the above-bounden in the presence of } C. D. (*Seal.*) E. F. (*Seal.*) G. H. (*Seal.*)

(21). *Memorandum of Deposit in lieu of a Bond on Removal.*

Memorandum made on the day of , 18 : Whereas an action of replevin was on the day of , 18 , commenced in the County Court of , holden at , wherein A. B. was plaintiff and C. D. was defendant: And whereas the Honorable Sir , knight, one of the judges of her Majesty's High Court of Justice [*or*, "And

whereas her Majesty's High Court of Justice"], on the application of the said C. D., did, on the day of , order that [*recite order for certiorari in past tense*, ex. gr.:] "a writ of certiorari should issue to remove the said action of replevin between the said A. B. and C. D., with all things touching the same, from the said County Court of , holden at , into her Majesty's High Court of Justice, on the said C. D. giving security as provided for by the 51 & 52 Vict. c. 34, s. 137:" And whereas the said C. D. has this day deposited with , Esq., one of the masters of the Division of the said High Court of Justice, the sum of £ sterling (being the amount fixed by the said master pursuant to the said Act): Now the condition of the said deposit is such, that if the said C. D. do defend the said action in her Majesty's High Court of Justice with effect, and, unless the said A. B. shall discontinue or shall not prosecute such action, or become nonsuit therein, if the said C. D. do prove before the Division of the said High Court of Justice that the said C. D. had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise was in question, or that the rent or damage in respect of which the distress in this behalf was taken exceeded twenty pounds, then the said deposit shall be void and returned to the said C. D., otherwise the same shall be applied and disposed of according to law.

I approve of this memorandum.
W. B., Master.

(Signed) C. D.
[*or*, C. D., by G. H., his attorney].

(22). *Writ of Certiorari to remove Action of Replevin.*

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the judge of the County Court of , holden at , greeting: We, being willing for certain causes to be certified of a plaint levied in our Court before you against C. D. at the suit of A. B. in an action of replevin, command you that you send to our High Court of Justice on , the plaint aforesaid,

with all things touching the same, as fully and entirely as it remains in our Court before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness [*name of Lord Chancellor*] at , the day of , in the year of our Lord 18 .

[*Indorsement.*]

"By order of Mr. [Justice *or* Baron] , dated the day of , 18 ;" *or* "By rule of Court, dated the day of , 18 ."

Add solicitor's name and address.

(23). *Return of County Court Judge to Certiorari* (*r*).

(*Indorsement on the writ.*)

The execution of this writ appears in the schedule hereunto annexed.

The answer of , Esq., judge of the County Court within mentioned.

[*Annex a schedule written on parchment, as follows:*]

I, , Esq., the judge of the County Court of , holden at , in the said county, do most humbly certify to our Sovereign lady the Queen, that at the date and suing forth of the writ of our said lady the Queen to me directed and to this schedule annexed (to wit) on [*teste of writ of certiorari*] A. B., in the said writ named, entered in the office of the registrar of the said County Court at aforesaid, a plaint in writing against C. D. in the said writ also named, for taking and unjustly detaining certain goods [and cattle] of the said A. B.: And that afterwards, on , a summons on the said plaint was issued under the seal of the said Court, according to the form of the statutes in that behalf, whereby the said C. D. was summoned to appear at the said

(*r*) See Chitty's Forms, 12th ed., p. 632.

Court to be holden at , in aforesaid, on , to answer the said A. B. to a claim, the particulars of which were thereunto annexed, and are as follows:—"In the County Court of [&c., *copy the particulars.*]" And this is the tenor and record of the process of the said plaint, with all things touching the same, as it remains before me.

(24). *Notice of filing Certiorari and Demand of Statement of Claim* (*s*).

In the High Court of Justice.

Between A. B., plaintiff,
and
C. D., defendant.

The defendant having sued out of this honourable Court a writ of certiorari directed to the judge of the County Court of , holden at , for removing the above cause out of the said County Court into this Court, returnable on the day of last past, I do hereby give you notice, that the defendant has filed the said writ, and the return thereto, with the proper officer of this Court, and has entered his appearance in the said action in this Court: And the plaintiff is hereby required to declare in the said action in four days, otherwise a judgment of *non pros.* will be signed against him.

Dated this day of , 18 .

Yours, &c.,
G. H., of ,
Defendant's [solicitor *or* agent].

To Mr. E. F., the plaintiff's
[solicitor *or* agent] (*t*).

(*s*) See Chitty's Forms, 12th ed., p. 632.

(*t*) The forms in Appendix B. (17) to (24) are taken from Woodfall's Landlord and Tenant, 12th ed., by Lely.

(25). *Form of Statement of Claim in Replevin.*

The plaintiff has suffered damage by the defendant in a dwelling-house, 501, Pall Mall [*or* in a place called Whiteacre, in the parish of St. Peter's, in the county of Surrey], taking the goods and chattels [*or*, the cattle] of the plaintiff, that is to say, household furniture and effects [*or*, four bullocks, *or as the case may be*], and unjustly detaining the same against sureties and pledges until, &c.

The plaintiff claims £ .

Place of trial .

(Signed) .

Delivered the day of 18 .

(26). *Avowry for Rent in Replevin.*

The defendant avows the taking of the said goods, and justly, as a distress for two quarters' rent in arrear from the of , 18 , to the of , 18 , and due and owing from the plaintiff as tenant to the defendant of the said farm in the statement of claim mentioned at the yearly rent of £ , payable quarterly.

(27). *Cognizance for Rent in Replevin.*

The defendant recognizes the taking of the said goods, and justly, as the bailiff of A. B., as a distress for two quarters' rent in arrear from the of , 18 , to the of , 18 , and due and owing to the said A. B. from the plaintiff as tenant to the said A. B., of the said house in the statement of claim mentioned at a yearly rent of £ , payable quarterly.

(28). *Avowry by Freeholder for a Distress damage feasant.*

The defendant avows the taking of the said cattle, and justly, as a distress for damage done wrongfully and unlawfully by them to the said close in the statement of claim mentioned, which was at time of the supposed taking of the said cattle the freehold of the defendant.

(29). *Avowry by Tenant for a Distress damage feasant.*

The defendant avows the taking of the said cattle, and justly, as a distress for damage done wrongfully and unlawfully by them to the said close in the statement of claim mentioned, which has been demised to the defendant for the term of years by A. B., who was seised in fee of the said close, and the defendant, by virtue of the said demise, entered into possession of the said close, and continued, and was at the time of the supposed taking of the said cattle, so in possession.

APPENDIX C. (*a*).

(1). *Complaint of the Overseers or Surveyors against one Ratepayer.*

} Be it remembered, that on the day of ,
to wit. } in the year of our Lord , the [churchwardens and overseers of the poor, or the surveyors of the highways] of the parish of , in the county of aforesaid, by C. D., one of the said [overseers or surveyors], complain to the undersigned [*one*] of her Majesty's justices of the peace, in and for the said [*county*], that A. B., of the said [*parish*], being a person duly rated and assessed to [the relief of the poor, *or* the maintenance of the highways] of the said parish, in and by a rate (*b*) made on the day of , in the year , in the sum of , hath not paid the same, or any part thereof, but hath refused so to do: Wherefore the said [churchwardens and overseers, *or* surveyors] by C. D. aforesaid, pray that the said A. B. may be summoned to appear before two of her Majesty's justices of the peace, to show cause why he hath not paid and refuses to pay the said sum.

C. D.

Made and exhibited before me, ,
at , in the county of , }
on this day of , 18 . }
E. F. }

(*a*) These forms are taken from the schedule to the statute 12 & 13 Vict. c. 14.

(*b*) *Or*, "in and by several rates made on , and on , in the several sums of , and of ."

(2). *Complaint against several Ratepayers.*

} Be it remembered that on the day of , in
to wit. } the year of our Lord , the [churchwardens and overseers of the poor, *or* the surveyors of the highways] of the parish of , in the [*county*] of aforesaid, by C. D. one of the said [overseers *or* surveyors], complain to the undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*], that the several persons whose names are mentioned and set out in the schedule hereunder written, being persons duly rated and assessed to [the relief of the poor, or the maintenance of the highways] of the said parish, in and by the rates in the said schedule mentioned, in certain sums set down opposite to their respective names in the said schedule, have not respectively paid the said sums or any part thereof, but have respectively refused so to do: Wherefore the said [churchwardens and overseers, *or* surveyors], by C. D. aforesaid, pray that the said several persons may respectively be summoned to appear before two of her Majesty's justices of the peace, to show cause respectively why they have not paid and refuse to pay the said sums respectively.

SCHEDULE.

Names of Ratepayers.	Residence.	Under rate dated the , 18 .	Arrears due under rate dated the , 18 .	Total sum due.
		£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
A. B.	[here state it]	1 7 0	1 7 0	2 14 0
J. K.		0 13 0		0 13 0
L. M.			0 18 6	0 18 6
N. P.		0 14 3	0 14 3	1 8 6

C. D.

Made and exhibited before me , at , in the county of , on this day of , 18 .

E. F.

(3). *Summons upon the Complaint.*

To A. B., of .

WHEREAS complaint hath this day been made before the undersigned, [*one*] of her Majesty's justices of the peace in and for the [*county*] of , by the [churchwardens and overseers of the poor, *or* surveyors of the highways] of the parish of , in the said [*county*], that you, being a person duly rated and assessed to [the relief of the poor, *or* the maintenance of the highways] of the said parish, in and by a rate made on the day of , 18 , in the sum of £ , hath not paid the same or any part thereof, but hath refused so to do: These are therefore to command you, in her Majesty's name, to be and appear on , at o'clock in the forenoon, at , before such two or more justices of the peace for the said [*county*] as may then be there, to show cause why you have not paid and refuse to pay the same, otherwise you shall be proceeded against by default as if you had appeared, and be dealt with according to law.

Given under my hand and seal this day of , in the year of our Lord , at , in the [*county*] aforesaid. E. F.

Take notice, that you have already incurred the undermentioned costs, viz.:

	s.	*d.*
Clerk to the justices.....		
Overseer [*or* surveyor], for obtaining the summons		
Constable, for serving ditto	1	0
Ditto, travelling expenses, at threepence per mile		
Total.....£		

If the amount of these charges, together with the rate claimed, be paid to the overseer [*or* surveyor] before the day on which the summons is returnable, all further proceedings will be stopped.

(4). *Warrant of Distress against One Ratepayer.*

To the overseers of the poor [*or* To the surveyors of the highways] of the parish of , in the [*county*] of , and to the constable of , and to all other peace officers in the said [*county*],

WHEREAS on last past a complaint was made before E. F., one of her Majesty's justices of the peace in and for the [*county*] of , by the [churchwardens and overseers of the poor *or* surveyors of the highways] of the parish of , in the said [*county*], that A. B., being a person duly rated and assessed to the relief of the poor [*or* to the maintenance of the highways] of the said parish, in and by a rate made on , in the sum of , had not paid the same or any part thereof, but had refused so to do; and now at this day, to wit, on , at , the parties aforesaid appear before us, the undersigned, two of her Majesty's justices of the peace in and for the said county [*or* the said churchwardens and overseers, *or* surveyors, by C. D., one of the said overseers, *or* surveyors, appear before us, the undersigned, two of her Majesty's justices of the peace in and for the said county, but the said A. B., although duly called, doth not appear by himself, his counsel or attorney, and it is now satisfactorily proved to us on oath that the said A. B. has been duly served with the summons in this behalf, which required him to be and appear here at this day before such two or more justices of the peace as should now be here, to answer the said complaint, and to be further dealt with according to law]; and now having heard the matter of the said complaint, and it being now duly proved to us upon oath [in the presence and hearing of the said A. B.] that an assessment for the [relief of the poor, *or* the maintenance of the highways] of the said parish of , and for other purposes chargeable thereon according to law, dated the , was duly made, allowed, and published, and that the said A. B. is therein and thereby assessed at the sum of aforesaid (*c*), and that the said sum hath been duly demanded of the

(*c*) "And that a certain other assessment for the relief," &c., *to note* (*c*), *if there be arrears.*

said A. B., but that he hath not paid, and hath refused and still refuses to pay the same; and the said A. B. now not showing to us any sufficient cause for not paying the same: These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if within the space of [*five*] days after the making of such distress the said sum, and the sum of for the costs incurred by the said [churchwardens and overseers, *or* surveyors] in obtaining this warrant, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale you retain the said sums of and , rendering the overplus, on demand, to the said A. B., the reasonable charges of taking, keeping, and selling the said distress being first deducted; and if no such distress can be found, that then you certify the same unto us, to the end that such further proceedings may be had herein as to the law doth appertain.

Given under our hands and seals this day of , in the year of our Lord , at , in the [*county*] aforesaid.

E. F.
G. H.

(5). *Warrant of Distress against several Ratepayers.*

To the overseers of the poor [*or* the surveyors of the highways] of the parish of , in the [*county*] of , and to the constables of , and to all other peace officers in the said [*county*].

Whereas on last past a complaint was made before E. F., one of her Majesty's justices of the peace in and for the [*county*] of , by the [churchwardens and overseers of the poor, *or* the surveyors of the highways] of the parish of , in the said [*county*], that the several persons whose names are mentioned and set forth in the schedule hereunder written, being persons duly rated and assessed to [the relief

of the poor, *or* maintenance of the highways] of the said parish, in and by the rates in the schedule in that complaint and in this warrant underwritten, in certain sums set down opposite to their respective names in the said schedule, had not respectively paid the said sums or any part thereof, but had respectively refused to do so; and now at this day, to wit, on , at , the said [churchwardens and overseers, *or* surveyors], by C. D., one of the said overseers, *or* surveyors, and A. B., J. K., and L. M., some of the said parties in the said schedule mentioned, appear before us, the undersigned, two of her Majesty's justices of the peace in and for the said [*county*], but the said N. P., although duly called, doth not appear by himself, his counsel or attorney, and it is now satisfactorily proved to us on oath that the said N. P. has been duly served with the summons in this behalf, which required him to be and appear here at this day, before such two or more justices of the peace as should now be here, to answer the said complaint, and to be further dealt with according to law; and now having heard the matter of the said complaint against the said several parties, and it being now duly proved to us upon oath, in the presence of the parties so appearing as aforesaid, that an assessment for [*the relief of the poor*] of the said parish of , and for other purposes chargeable therein according to law, dated the , was duly made, allowed, and published, and that the said several persons whose names are mentioned and set out in the schedule hereunder written are therein and thereby assessed at the sums set down opposite to their respective names in the said schedule, and that the said several sums have been duly demanded of them respectively, but they have not, nor hath any of them, paid the said sums or any of them, or any part thereof respectively, but they have refused and still do refuse to pay the same respectively, and have not, nor hath any of them, showed to us sufficient cause for not paying the same: These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the several persons whose names are mentioned and set out in the schedule hereunder written; and if within the space of *five* days after the making of such distresses respectively the said several sums set opposite to their respective names at which

they were so rated and assessed as aforesaid, and the said several sums for costs incurred by the said [churchwardens and overseers, *or* surveyors] also set opposite to their respective names, together with the reasonable charges of taking and keeping the said distress in each case, shall not be paid, that then you do sell the goods and chattels of the party so making default so by you distrained, and out of the money arising by such sales respectively you retain the sums so set opposite to the name of each party whose goods you shall have so sold, rendering to him the overplus, the reasonable charges of taking, keeping, and selling the said distress being first deducted; and if in any of the cases mentioned in the schedule hereunder written no such distress can be found, that then you certify the same unto us, to the end that such further proceedings may be had herein as to the law doth appertain.

SCHEDULE.

Names of Ratepayers.	Residence.	Under rate dated , 18 .	Arrears due under rate dated , 18 .	Costs.	Total.
		£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*	£ *s.* *d.*
A. B.....	[here state it]	1 7 0	1 7 0	0 6 0	3 0 0
J. K.....		0 13 0		0 2 6	0 15 6
L. M. ..			0 18 6	0 3 0	1 1 6
N. P. ..		0 14 3	0 14 3	0 5 0	1 13 6

Given under our hands and seals, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

E. F.
G. H.

(6). *Warrant of Commitment in default of Distress.*

To the overseers of the poor [*or* the surveyors of the highways] of the parish of , in the [*county*] of , and to the constable of , and to all other peace officers in the said [*county*], and to the keeper of the [*house of correction*] at , in the said [*county*].

WHEREAS on last past a complaint was made before E. F., esquire, one of her Majesty's justices of the peace in and for the said [*county*] of , by the [churchwardens and overseers of the poor, *or* surveyors of the highways] of the parish of , in the said [*county*], that A. B., being a person duly rated to the [relief of the poor, *or* maintenance of the highways] of the said parish, in and by a rate made on , in the sum of , had not paid the same or any part thereof, but had refused so to do; and afterwards on , at , the parties aforesaid appeared before E. F. and G. H., esquires, two of her Majesty's justices of the peace in and for the said county [*or* the said churchwardens and overseers, *or* surveyors, by C. D., one of the said overseers, *or* surveyors, appeared before E. F. and G. H., esquires, two of her Majesty's justices of the peace in and for the said county, but the said A. B., although duly called, did not appear by himself, his counsel or attorney, and it was then satisfactorily proved to the said justices that the said A. B. had been duly served with the summons in that behalf, which required him to be and appear there at that day, before such two or more justices of the peace as should then be there, to answer the said complaint, and to be further dealt with according to law]; and then having heard the matter of the said complaint, and it being then duly proved to the said justices upon oath [in the presence and hearing of the said A. B.] that an assessment for the [relief of the poor, *or* the maintenance of the highways] of the said parish of , dated the , was duly made, allowed, and published, and that the said A. B. was therein and thereby assessed at the sum of aforesaid, and that the said sum had been duly demanded of the said A. B., but that he had not paid, and had refused and still refused to pay the same, and the said A. B. then not showing to the said E. F. and G. H. any

sufficient cause for not paying the same, the said justices thereupon then issued a warrant to , commanding them to levy the said sum of , and the sum of for the costs incurred in obtaining that warrant, by distress and sale of the goods and chattels of the said A. B.: And whereas it now appears to me, the undersigned, one of her Majesty's justices of the peace in and for the said [*county*], as well by the return of the said to the said warrant of distress as otherwise, that the said hath made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the said sums above mentioned could be found: These are therefore to command you, the said [churchwardens and overseers, *or* surveyors] and constable and peace officers, or some or one of you, to take the said A. B., and him safely to convey to the [*house of correction*] at aforesaid, and there deliver him to the said keeper, together with this precept; and I hereby command you, the said keeper of the said [*house of correction*], to receive the said A. B. into your custody in the said [*house of correction*], there to imprison him for the space of , unless the said sums of and , together with the sum of for the costs attending the said distress, and the further sum of , being the costs and charges of this commitment, and of taking and conveying the said A. B. to prison, making in the whole the sum of , shall be sooner paid unto you, the said keeper; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

APPENDIX D. (*a*).

(1). *Warrant of Distress upon a Conviction for a Penalty.*

To the constable of , and to all other peace officers in the said [*county*] of .

WHEREAS A. B., late of , [*labourer*], was on this day, [*or* on last past] duly convicted before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said county of , for that [*stating the offence as in the conviction*]; and it was thereby adjudged that the said A. B. should for such his offence forfeit and pay [&c., *as in the conviction*]; and should also pay to the said C. D. the sum of for his costs in that behalf; and it was thereby ordered that if the said several sums should not be paid [*forthwith*], the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was thereby also adjudged that in default of sufficient distress the said A. B. should be imprisoned in the [*house of correction*] at , in the said county, [*and there kept to hard labour*] for the space of , unless the said several sums, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said [*house of correction*], should be sooner paid: And whereas the said A. B., being so convicted as aforesaid, and being [*now*] required to pay the said sums of and , hath not paid the same or any part thereof, but therein hath made default: These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if within the space of days next after the making

(*a*) The forms in this Appendix are taken from the schedule to the statute 11 & 12 Vict. c. 43.

of such distress the said sums, together with the reasonable charges of taking and keeping the distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising by such sale unto , the clerk of the justices of the peace for the division of , in the said [*county*], that he may pay and apply the same as by law is directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress can be found, then that you certify the same unto me, to the end that such further proceedings may be had thereon as to the law doth appertain.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(2). *Warrant of Distress upon an Order for the Payment of Money.*

To the constable of , and to all other peace officers in the said [*county*] of .

WHEREAS on last past, a complaint was made before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said county of , for that [&c., *as in the order*]; and afterwards, to wit, on , at , the said parties appeared before me [*or as in the order*], and thereupon, having considered the matter of the said complaint, I adjudged the said A. B. to [*pay to the said C. D. the sum of on or before the then next*], and also to pay to the said C. D. the sum of for his costs in that behalf; and I thereby ordered that if the said several sums should not be paid on or before the said then next, the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was adjudged that in default of sufficient distress in that behalf, the said A. B. should be imprisoned in the [*house of correction*] at , in the said county, [*and there kept to hard labour*] for the space of , unless the said several sums, and all costs and charges of the

distress, [*and of the commitment and conveying of the said A. B. to the said house of correction,*] should be sooner paid. And whereas the time in and by the said order appointed for the payment of the said several sums of and hath elapsed, but the said C. D. hath not paid the same or any part thereof, but therein hath made default. These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within the space of days after the making of such distress the said last-mentioned sums, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale unto , the clerk of the justices of the peace for the division of , in the said [*county*], that he may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress can be found, then that you certify the same unto me, to the end that such proceedings may be had therein as to the law doth appertain.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(3). *Endorsement in Backing a Warrant of Distress.*

} Whereas proof upon oath hath this day been made to wit. } before me, one of her Majesty's justices of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed is of the handwriting of the justice of the peace within-mentioned: I do therefore authorize W. T., who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and also all constables and other peace officers of the said [*county*] of , to execute the same within the said county of .

Given under my hand, this day of , 188 .

J. B.

(4). *Constable's Return to a Warrant of Distress.*

I, W. T., constable of , in the [*county*] of , do hereby certify to J. S., Esquire, one of her Majesty's justices of the peace for the said county, that by virtue of this warrant I have made diligent search for the goods and chattels of the within-mentioned A. B., and that I can find no sufficient goods or chattels of the said A. B. whereon to levy the sums within-mentioned.

Witness my hand, this day of , 188 .

W. T.

(5). *Warrant of Commitment for want of Distress.*

To the constable of , and to the keeper of the [*house of correction*] at , in the said [*county*] of .

Whereas [&c., *as in either of the foregoing distress warrants*, 1 *and* 2]: And whereas afterwards, on the day of in the year aforesaid, I, the said justice, issued a warrant to the constable of , commanding him to levy the said sums of and by distress and sale of the goods and chattels of the said A. B.: And whereas it appears to me, as well by the return of the said constable to the said warrant of distress as otherwise, that the said constable hath made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sums above mentioned could be found: These are therefore to command you, the said constable of , to take the said A. B., and him safely to convey to the [*house of correction*] at aforesaid, and there deliver him to the said keeper, together with this precept; and I do hereby command you, the said keeper of the said [*house of correction*], to receive the said A. B. into your custody in the said [*house of correction*], there to imprison him [*and keep him to hard labour*] for the space of , unless the said several sums, and all the costs and charges of the said distress, [*and of the commitment and conveying of the said A. B. to the said house of correction,*] amounting to the further sum of , shall be sooner paid unto you, the said

keeper; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(6). *Warrant of Commitment upon a Conviction for a Penalty in the first instance.*

To the constable of , and to the keeper of the [*house of correction*] at , in the said [*county*] of .

WHEREAS A. B., late of , [*labourer*], was on this day duly convicted before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*], for that [*stating the offence as in the conviction*]; and it was thereby adjudged that the said A. B. for his said offence should forfeit and pay the sum of [&c., *as in the conviction*], and should pay to the said C. D. the sum of for his costs in that behalf; and it was thereby further adjudged that if the said several sums should not be paid [*forthwith*], the said A. B. should be imprisoned in the [*house of correction*] at , in the said [*county*], [*and there kept to hard labour*] for the space of , unless the said several sums [*and the costs and charges of conveying the said A. B. to the said house of correction*] should be sooner paid: And whereas the time in and by the said conviction appointed for the payment of the said several sums hath elapsed, but the said A. B. hath not paid the same or any part thereof, but therein hath made default: These are therefore to command you, the said constable of , to take the said A. B., and him safely to convey to the [*house of correction*] at aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said [*house of correction*], to receive the said A. B. into your custody in the said [*house of correction*], there to imprison him [*and keep him to hard labour*] for the space of , unless the said several sums [*and the costs and charges of*

conveying him to the said (house of correction), amounting to the further sum of ,] shall be sooner paid; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(7). *Warrant of Commitment on an Order in the first instance.*

To the constable of , and to the keeper of the [*house of correction*] at , in the said [*county*] of .

WHEREAS on last past complaint was made before the undersigned [*one*] of her Majesty's justices of the peace in and for the said county of , for that [&c., *as in the order*]; and afterwards, to wit, on , at , the parties appeared before [*me*], the said justice [*or as it may be in the order*], and thereupon, having considered the matter of the said complaint, I adjudged the said A. B. to pay to the said C. D. the sum of on or before the day of then next, and also to pay to the said C. D. the sum of for his costs in that behalf; and I also thereby adjudged that if the said several sums should not be paid on or before the day of than next, the said A. B. should be imprisoned in the [*house of correction*] at , in the said county, [*and there kept to hard labour*] for the space of , unless the said several sums [*and the costs and charges of conveying the said A. B. to the said house of correction*] should be sooner paid. And whereas the time in and by the said order appointed for the payment of the said several sums of money hath elapsed; but the said A. B. hath not paid the same or any part thereof, but therein hath made default: These are therefore to command you, the said constable of , to take the said A. B. and him safely convey to the said [*house of correction*] at aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said [*house of correction*], to receive the said A. B. into your custody in the said [*house of correction*],

there to imprison him [*and keep him to hard labour*] for the space of , unless the said several sums [*and the costs and charges of conveying him to the said house of correction, amounting to the further sum of* ,] shall be sooner paid unto you, the said keeper; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(8). *Warrant of Commitment on a Conviction where the Punishment is by Imprisonment.*

To the constable of , and to the keeper of the [*house of correction*] at , in the said [*county*] of .

WHEREAS A. B., late of , [*labourer*], was this day duly convicted, before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said [*county*] of , for that [*stating the offence as in the conviction*]; and it was thereby adjudged that the said A. B. for his said offence should be imprisoned in the *house of correction* at , in the said county [*and there kept to hard labour*] for the space of : These are therefore to command you, the said constable of , to take the said A. B., and him safely convey to the *house of correction* at aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said *house of correction*, to receive the said A. B. into your custody in the said *house of correction*, there to imprison him [*and keep him to hard labour*] for the space of ; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(9). *Warrant of Commitment on an Order, where the disobeying of it is punishable by Imprisonment.*

To the constable of , and to the keeper of the [*house of correction*] at , in the said [*county*] of .

WHEREAS on last past complaint was made before the undersigned [*one*] of her Majesty's justices of the peace in and for the said county of , for that [&c., *as in the order*]; and afterwards, to wit, on , at , the said parties appeared before me [*or as it may be in the order*], and thereupon, having considered the matter of the said complaint, I adjudged the said A. B. to [&c., *as in the order*]; and that if upon a copy of the minute of that order being duly served upon the said A. B., either personally, or by leaving the same for him at his last or most usual place of abode, he should neglect or refuse to obey the same, it was adjudged that in such case the said A. B. for such his disobedience should be imprisoned in the [*house of correction*] at , in the said county [*and there kept to hard labour*] for the space of [*unless the said order should be sooner obeyed*]: And whereas it is now proved to me that after the making of the said order a copy of the minute thereof was duly served upon the said A. B., but he then refused [*or* neglected] to obey the same and hath not as yet obeyed the said order: These are therefore to command you, the said constable of , to take the said A. B., and him safely to convey to the [*house of correction*] at aforesaid, and there to deliver him to the keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said [*house of correction*], to receive the said A. B. into your custody in the said [*house of correction*], there to imprison him [*and keep him to hard labour*] for the space of ; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(10). *Warrant of Distress for Costs upon a Conviction, where the Offence is punishable by Imprisonment.*

To the constable of , and to all other peace officers in the said [*county*] of .

Whereas A. B., of [*labourer*], was, on last past, duly convicted before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said county, for that [*stating the offence as in the conviction*]; and it was thereby adjudged that the said A. B., for his said offence, should be imprisoned in the *house of correction* at , in the said county [*and there kept to hard labour*] for the space of ; and it was also thereby adjudged that the said A. B. should pay to the said C. D. the sum of £ for his costs in that behalf; and it was thereby ordered that if the sum of £ for costs should not be paid [*forthwith*], the same should be levied by distress and sale of the goods and chattels of the said A. B.; [and it was adjudged that in default of sufficient distress in that behalf the said A. B. should be imprisoned in the said *house of correction* [*and there kept to hard labour*] for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said *house of correction* should be sooner paid:] And whereas the said A. B., being so convicted as aforesaid, and being required to pay the said sum of £ for costs, hath not paid the same or any part thereof, but therein hath made default: These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if within the space of days next after the making of such distress the said last-mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale to , the clerk of the justices of the peace for the division of , in the said [*county*], that he may pay the same as by law directed, and may render the surplus (if any), on demand, to the said A. B.;

and if no such distress can be found, then that you certify the same unto me, to the end that such proceedings may be had therein as to the law doth appertain.

Given under my hand and seal this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(11). *Warrant of Distress for Costs upon an Order, where the disobeying of the Order is punishable with Imprisonment.*

To the constable of , and to all other peace officers in the said [*county*] of .

WHEREAS on last past complaint was made before the undersigned, [*one*] of her Majesty's justices of the peace in and for the said county of , for that [&c., *as in the order*]; and afterwards, to wit, on , at , the said parties appeared before me, as such justice as aforesaid [*or as it may be in the order*], and thereupon, having considered the matter of the said complaint, I adjudged the said A. B. to [&c., *as in the order*]; and that if upon a copy of the minute of that order being served upon the said A. B., either personally, or by leaving the same for him at his last or most usual abode, he should neglect or refuse to obey the same, I adjudged that in such case the said A. B., for such his disobedience, should be imprisoned in the *house of correction* at , in the said *county* [*and there kept to hard labour*] for the space of [*unless the said order should be sooner obeyed*]; and I thereby also adjudged the said A. B. to pay to the said C. D. the sum of £ for his costs in that behalf; and I ordered that if the said sum for costs should not be paid [*forthwith*], the same should be levied on the goods and chattels of the said A. B.; [and in default of sufficient distress in that behalf I thereby adjudged that the said A. B. should be imprisoned in the said *house of correction* [*and there kept to hard labour*] for the space of to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs, and all costs and charges of the said distress, and of the

commitment and conveying of the said A. B. to the said *house of correction*, should be sooner paid]: And whereas after the making of the said order a copy of the minute thereof was duly served upon the said A. B., but the said A. B. did not then pay, nor hath he paid, the said sum of for costs or any part thereof, but therein hath made default: These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.: and if within the space of days next after the making of such distress the said last-mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale to , the clerk of the justices of the peace for the division of , in the said [*county*], that he may pay the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress can be found, then that you certify the same unto me, to the end that such proceedings may be had therein as to the law doth appertain.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(12). *Warrant of Commitment for want of Distress in either of the last two Cases.*

To the constable of , and to the keeper of the [*house of correction*] at , in the said [*county*] of .

WHEREAS [&c., *as in the last two forms respectively, and then thus*]: And whereas afterwards, on the day of in the year aforesaid, I, the said J. S., issued a warrant to the constable of , commanding him to levy the said sum of for costs by distress and sale of the goods and chattels of the said A. B.: And whereas it appears to me, as well by the return of the said constable to the said warrant of distress as otherwise, that the said constable hath made diligent search for the goods and chattels of the said A. B., but that no

sufficient distress whereon to levy the sum above mentioned could be found: These are therefore to command you, the said constable of , to take the said A. B., and him safely to convey to the [*house of correction*] at aforesaid, and there deliver him to the keeper thereof, together with this precept; And I do hereby command you, the said keeper of the said *house of correction*, to receive the said A. B. into your custody in the said *house of correction*, there to imprison him [*and keep him to hard labour*] for the space of , unless the said sum, and all costs and charges of the said distress, [*and of the commitment and conveying of the said A. B. to the said house of correction*,] amounting to the further sum of , shall be sooner paid unto you, the said keeper; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(13). *Warrant of Distress for Costs upon an Order for Dismissal of an Information or Complaint.*

To the constable of , and to all other peace officers in the said [*county*] of .

WHEREAS on last past, information was laid [*or* complaint was made] before the undersigned [*one*] of her Majesty's justices of the peace in and for the said *county*, for that [&c., *as in the order of dismissal*]; and afterwards, to wit, on , at , both parties appearing before me in order that I should hear and determine the same, and the several proofs adduced to me in that behalf being by me duly heard and considered, and it manifestly appearing to me that the said information [*or* complaint] was not proved, I therefore dismissed the same, and adjudged that the said C. D. should pay to the said A. B. the sum of , for his costs incurred by him in his defence in that behalf; and I ordered that if the said sum for costs should not be paid [*forthwith*], the same should be levied of the goods and chattels of the said C. D.; [and I adjudged that in default of

sufficient distress in that behalf the said C. D. should be imprisoned in the *house of correction* at , in the said county, *and there kept to hard labour* for the space of , unless the said sum for costs, and all costs and charges of the said distress, and of the commitment and conveying of the said C. D. to the said *house of correction* should be sooner paid:] (*) And whereas the said C. D., being now required to pay unto the said A. B. the said sum for costs, hath not paid the same or any part thereof, but therein hath made default: These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the said C. D.; and if within the space of days next after the making of such distress the said last-mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale to , the clerk of the justices of the peace for the division of , in the said [*county*], that he may pay and apply the same as by law directed, and may render the overplus (if any), on demand, to the said C. D.; and if no such distress can be found, then that you certify the same unto me, to the end that such proceedings may be had therein as to the law doth appertain.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(14). *Warrant of Commitment for want of Distress in the last Case.*

To the constable of , and to the keeper of the [*house of correction*] at , in the said [*county*] of .

WHEREAS [&c., *as in the last form to the asterisk* (*), *and then thus*]: And whereas afterwards, on the day of , in the year aforesaid, I, the said justice, issued a warrant to the constable of , commanding him to levy the said sum of £ for costs by distress and sale of the goods and chattels of the said C. D.: And whereas it appears to me, as well by

the return of the said constable to the said warrant of distress as otherwise, that the said constable hath made diligent search for the goods and chattels of the said C. D., but that no sufficient distress whereon to levy the sum above mentioned could be found: These are therefore to command you, the said constable of , to take the said C. D., and him safely convey to the *house of correction* at , aforesaid, and there deliver him to the said keeper thereof, together with this precept: and I do hereby command you, the said keeper of the said *house of correction*, to receive the said C. D. into your custody in the said *house of correction*, there to imprison him [*and keep him to hard labour*] for the space of , unless the said sum, and all costs and charges of the said distress [*and of the commitment and conveying of the said C. D. to the said house of correction*], amounting to the further sum of £ , shall be sooner paid unto you, the said keeper; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. S. (L.S.)

(15). *Certificate of Clerk of the Peace that the Costs of an Appeal are not paid.*

Office of the clerk of the peace for the [*county*] of .

(*Title of the Appeal.*)

I hereby certify, that at a Court of General Quarter Sessions of the Peace, holden at , in and for the said [*county*], on last past, an appeal by A. B. against a conviction [*or* order] of J. S., Esquire, one of her Majesty's justices of the peace for the said [*county*], came on to be tried, and was then heard and determined, and the said Court of General Quarter Sessions thereupon ordered that the said conviction [*or* order] should be confirmed [*or* quashed], and that the [*appellant*] should pay to the said [*respondent*] the sum of for his costs incurred by him in the said appeal, and which sum was thereby ordered to be paid to the clerk of the

peace of the said county on or before the day of instant, to be by him handed over to the said [*respondent*]; and I further certify that the said sum for costs has not, nor has any part thereof, been paid in obedience to the said order.

Dated the day of , 18 .

G. H.,
[*Deputy*] Clerk of the Peace.

(16). *Warrant of Distress for Costs of an Appeal against a Conviction or Order.*

To the constable of , and to all other peace officers in the said [*county*] of .

Whereas [&c., *as in the warrants of distress*, 1 *and* 2, *ante, to the end of the statement of the conviction or order, and then thus*]: And whereas the said A. B. appealed to the Court of General Quarter Sessions of the Peace for the said county against the said conviction [*or* order], in which appeal the said A. B. was the appellant, and the said C. D. [*or* J. S., Esquire, the justice of the peace who made the said conviction *or* order,] was the respondent; and which said appeal came on to be tried, and was heard and determined, at the last general quarter sessions of the peace for the said county, holden at , on ; and the said Court of General Quarter Sessions thereupon ordered that the said conviction [*or* order] should be confirmed [*or* quashed], and that the said [*appellant*] should pay to the said [*respondent*] the sum of £ for his costs incurred by him in the said appeal, which said sum was to be paid to the clerk of the peace of the said [*county*] on or before the day of , 18 , to be by him handed over to the said [C. D.]: And whereas the [*deputy*] clerk of the peace of the said [*county*] hath, on the day of , instant, duly certified that the said sum for costs had not then been paid: (*) These are therefore to command you, in her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B.; and if within the space of days next after the making of such distress the said last-

mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods and chattels so by you distrained, and do pay the money arising from such sale to , the clerk of the justices of the peace for the division of , in the said [*county*], that he may pay and apply the same as by law directed; and if no such distress can be found, then that you certify the same unto me, to the end that such proceedings may be had therein as to the law doth appertain.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. N. (L.S.)

(17). *Warrant of Commitment for want of Distress in the last Case.*

To the constable of , and to the keeper of the [*house of correction*] at , in the said [*county*] of .

WHEREAS [&c., *as in the last form to the asterisk* (*), *and then thus*]: And whereas afterwards, on the day of , in the year aforesaid, I, the undersigned, issued a warrant to the constable of , commanding him to levy the said sum of , for costs by distress and sale of the goods and chattels of the said A. B.: And whereas it appears to me, as well by the return of the said constable to the said warrant of distress as otherwise, that the said constable hath made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sum above mentioned could be found: These are therefore to command you, the said constable of , to take the said A. B., and him safely to convey to the [*house of correction*] at aforesaid, and there deliver him to the said keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said [*house of correction*], to receive the said A. B. into your custody in the said [*house*

of correction], there to imprison him [*and keep him to hard labour*] for the space of , unless the said sum, and all costs and charges of the said distress, [*and of the commitment and conveying of the said A. B. to the said house of correction,*] amounting to the further sum of £ , shall be sooner paid unto you, the said keeper; and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year of our Lord , at , in the [*county*] aforesaid.

J. N. (L.S)

(18). *Collector's Warrant* (*a*).

To and , of , in the district of , in the county of .

Whereas you, the above-named and , were on the day of last duly nominated and appointed by the Commissioners of the Income Tax and Inhabited House Duties, acting in and for the district aforesaid, in the county aforesaid, to be collectors of the duties on profits arising from property, professions, trades and offices, and of the duties on inhabited houses [*or as the case may be*], for the (*b*) of in the said district, for the year ending 5th day of April, 18 .

And whereas, by virtue and in pursuance of the powers and authorities of the several Acts of Parliament relating to the said duties, we, the said Commissioners, have signed and allowed the [*foregoing*] duplicate of the assessments of the said duties, chargeable under the respective Schedules (A.) and (B.) [*or* (D.) and (E), *as the case may require*] of the Act 16 & 17 Vict. c. 34, and of the duties on inhabited houses, under the Act 14 & 15 Vict. c. 36, and charged upon the several

(*a*) This warrant may be printed on the duplicate, or be a separate document.

(*b*) Where parishes or places have been united for tax purposes all the names should be inserted and described as the "united parishes or places of ."

persons mentioned in the foregoing duplicate within the aforesaid, for the year ending the 5th day of April, 18 .

Now we, the said Commissioners, do hereby enjoin and require you, the above-named collectors, or either of you, to make demand of the several sums contained in the foregoing duplicate from the parties charged therewith, or at the places of their last abode, or on the premises charged with the assessment, as the case may require, within the time and in the manner appointed and directed by the said Acts; and upon payment thereof to give acquittances under your hands (without taking anything for such acquittances) unto the several persons who shall pay the same; and if any person or persons shall refuse to pay the sum or sums charged upon him, her, or them, upon demand duly made by you, or either of you, then we do hereby enjoin and strictly require you, or either of you, for non-payment thereof, to distrain for the same according to the directions of the said Acts, by virtue of this our warrant, without further authority.

Given under our hands and seals at , within the said district, this day of , in the year of our Lord, 18 .

} Commissioners of the Income Tax and Inhabited House Duties.

(19). *Collector's Warrant, which may be issued during the period the Schedules of Defaulters remain with the Commissioners.*

To and collectors of the duties hereinafter mentioned for the of , in the district of , in the county of .

Whereas the Commissioners of the Income Tax acting in and for the before-mentioned district, have made and executed the several assessments of the duties on profits arising from property, professions, trades, and offices, for the year ending

the 5th day of April, 18 , upon the several persons chargeable with the said duties within the aforesaid, and duplicates of the same have been delivered to you, the above-named collectors of the said duties: And whereas the said commissioners have received, in pursuance of the Acts of Parliament in that behalf, a certain schedule in writing, signed and duly sworn to by you the said collectors, whereby the several persons therein named are returned as defaulters, for that the several sums assessed upon them and therein contained have been demanded from and are due and wholly unpaid for the respective persons charged therewith: Now we, the undersigned Commissioners of the Income Tax acting in and for the district aforesaid, do hereby enjoin and require you, or either of you, the above-named collectors, to make demand of the several sums mentioned in the said schedule, and contained in the said assessments, from the parties charged therewith, or at the places of their last abode, or on the premises charged with the assessment as the case may require, and upon payment thereof to give acquittances under your hands unto the several persons who shall pay the same; and if any person or persons shall refuse to pay the sum and sums charged upon him, her, or them upon demand duly made by you, or either of you, then we hereby enjoin and strictly require you, or either of you, for non-payment thereof, to distrain for the same, according to the directions of the said Acts by virtue of this our warrant, and that you return to us the amount and particulars of the several sums received by you on the day of now next, at the usual place of meeting, namely, at in the said district.

Given under our hands and seals at , in the said district, the day of in the year of our Lord, 18 .

} Commissioners of the
} Income Tax.

(20). *Certificate of Removal.*

To and collectors of the duties on profits arising from property, professions, trades, and offices, and of inhabited house duties, for the of , in the district of , in the county of .

We, the undersigned Commissioners of the Income Tax and Inhabited House Duties acting within and for the district of aforesaid, do hereby authorize and require you, the above-named collectors, or either of you, to make due demand of and from , the person named in the foregoing certificate, of payment of the sum of , in respect of the duties charged and assessed upon him, as in the said certificate is mentioned, and if he shall refuse or neglect to pay the same upon such demand being made, then we hereby empower and require you, or either of you, to distrain for the same, according to the directions of the statute in that behalf, by virtue of this our warrant, without further authority: And upon receipt of the said sum of money, or any part thereof, we hereby direct and enjoin you to pay over the same to the collector of Inland Revenue for the county of , to the account of , the collectors of the said duties for the , of , for which this shall be your sufficient authority.

Given under our hands and seals at , in the said district of , this day of , in the year of our Lord 18 .

} Commissioners of the Income Tax and Inhabited House Duties.

N.B.—As a collector of the parish or place where the duties herein certified are assessed and due has not collected the same, and as, therefore, he is not entitled to any poundage thereon, the collector of any other parish or place who shall collect the said duties, will, on payment thereof to the receiving officer, be allowed the poundage to which the first mentioned collector would have been entitled if the duties had been collected by him.

(21). *Warrant to Break Open.*

To and , collectors of the duties hereinafter mentioned for the of , in the district of , in the county of .

Whereas in and by the assessments of the duties of income tax and the duties on inhabited houses for the aforesaid for the year ending the 5th day of April, 18 , of hath been duly charged to the said duties in the sum of .

And whereas it appears by the oath that , collector of the said duties appointed for the said taken before us, whose hands and seals are hereunto subscribed and set, being two of the Commissioners of the Income Tax and Inhabited House Duties acting in and for the district aforesaid, that the said sum of hath been duly demanded of the said , and that he hath refused and neglected to pay the same, and that the same now remains due and unpaid:

And whereas it further appears by the oath aforesaid that divers goods and chattels, liable by law to be distrained for the said duties, are lying and being in a certain house situate in the of , in the district and county aforesaid, now in the possession of .

These are, therefore, to authorize and require you, the above-named collectors, and either of you, calling to your assistance the constable or other peace officer within and for the of aforesaid, and in the presence of the said constable, or other peace officer, to demand entrance into the said house, and in case of resistance, or neglect or refusal to open the same, to break open in the daytime the said house, and enter the same, and to distrain therein the said goods and chattels, and the distress there found to keep by the space of five days, at the costs and charges of the said , and if the whole of the said sum of , together with the said costs and charges, be not paid within the said five days, then the said distress having been first duly valued and appraised by two of the inhabitants of the said of , or other sufficient persons, to be sold by you, and the overplus, if any,

of the moneys arising by such sale, after paying and deducting the said sum of , and all costs and charges of taking, keeping, and selling the said distress, to be restored to the owner thereof.

Given under our hands and seals at , within the said district, this day of , in the year of our Lord 18 .

} Commissioners of the Income Tax and } Inhabited House Duties.

(22). *Warrant of Commitment.*

To and , collectors of the duties hereinafter mentioned for the of , in the district of , in the county of , and to the keeper of her Majesty's prison at .

Whereas in and by the , assessments of the duties payable under the Schedule of the Act 16 & 17 Vict. c. 34, for the of , in the district of , in the county of , for the year ending the 5th day of April, 18 , of hath been duly charged and assessed to the said duties in the sum of . And whereas it appears by the oath of , collector of the said duties appointed for the said , of , taken before us, whose hands and seals are hereunto subscribed and set, being two of the Commissioners of the Income Tax, acting in and for the district of aforesaid, that the said sum of as and for the duties so charged and assessed as aforesaid, hath been duly demanded of the said , and that he hath refused and neglected to pay the sum of , part of the said sum of , by the space of ten days after such demand as aforesaid; and it further appears by the oath aforesaid that the said sum of , for the duties charged and assessed as aforesaid, now remains due and unpaid, and that no sufficient distress can or may be found whereby the same may be levied.

Now, therefore, we, the said Commissioners, whose hands and

seals are hereunto subscribed and set, do hereby command you, the above-named collectors of the said duties, or either of you, to apprehend the said , and to take him to her Majesty's prison at , in the said county, and to deliver him to the keeper thereof, together with this warrant; and we do hereby command you, the said keeper, to receive him, the said , into your custody in the said prison, there to be kept without bail until payment shall be made, or security to our satisfaction be given for payment of the said sum of remaining due and unpaid as aforesaid, and also of the further sum of , which we, the said Commissioners, do adjudge to be reasonable for the costs and expenses of apprehending the said , and conveying him to prison.

Given under our hands and seals at within the said district, the day of , in the year of our Lord 18 .

} Commissioners of the Income Tax.

INDEX.

ABANDONMENT,
what constitutes an, 222, 223, 225, 314.
temporary, 223.
re-entry in case of an, 222, 223.
rescue in case of, 314.
of a bad distress warrant, 381, 382.
in case of a second distress, 288.

ABSOLUTE
privilege from distress, 119—146.

ABUSE,
of a distress damage feasant, 307, 308.
remedy for, 307, 327.
of a distress whilst in the pound, 235.
exceptions, 235, 236.
rescue in case of, 314.

ACCEPTANCE,
of single instead of double rent, 284.

ACKNOWLEDGMENT,
of tenancy, when sufficient to authorise a distress, 36.

ACT OF GOD,
animals injured in pound by, 235.
apportionment of rent-service in case of, 22.
in case of a rent-charge, 74.

ACT OF LAW,
apportionment of rent-service by, 23.

ACT OF PARTIES,
apportionment of rent-service by, 23.

ACTION,
a power of distress implies an antecedent right of, 29.
recovery of double rent by, 177.
recovery of double value of goods fraudulently removed by, 202, 203.
of replevin, 342—373.
in Superior Court, 351, 364—370.
in County Court, 352, 353, 359—364.
joinder of causes of action in replevin, 360.
where proceeds of distress insufficient, 264, 265.

ACTION—*continued.*
discontinuance of, in replevin, 366.
for wrongful distress, 320.
no action for poor rates where there is a remedy by distress, 377.
for return of goods *in specie*, 321.
no action where defect in a poor rate, 383.
for irregular distress, 326—334.
for excessive distress, 334—341.
where distress wrongful as well as excessive, 336.
by a lodger, 339.
when mortgagee can decline to defend replevin action, 350.

ACTUAL
seizure, 225.

ACTUAL DEMISE,
at a fixed rent, 29—32, 281.
may be implied, 32.
difference between a demise and a mere licence, 34, 35.

ACTUAL USE,
exemption from distress of things in, 139.
in case of damage feasant, 301.
as regards goods privileged *sub modo*, 146.

ADMINISTRATORS,
replevin by, 349.
rights of executors and administrators *inter se*, 60, 61.
distress by, 57—61.
when entitled to rent under the 8 Anne, c. 14..273.
time when they may distrain, 61.
powers under 32 Hen. VIII. c. 37..57—59.
powers under 3 & 4 Will. IV. c. 42..58, 59.

ADMIRALTY PROCESS,
executions under, 279, 280.

ADOPTION
by landlord of bailiff's illegal acts, 208, 209.

ADVANCE,
rents payable in, 17, 18, 168—170.
by custom, 168.
under the 8 Anne, c. 14..271.

ADVERTISEMENTS,
expenses of, on a distress, 257.

ADVOWSON,
rent cannot issue out of an, 3.

AGENT,
power of distress by, 81, 82.
as regards distress is considered as a bailiff, 82, 292.
tender of rent to an, 292.

AGISTMENT,
of live stock for "fair price" under the Agricultural Holdings (England) Act, 1883..148, 149.
in case of commoners, 299.

AGREEMENT,
for future leases, 7—10.
in case of excessive distress, 337.
not to appeal in County Court action of replevin, 364.
not to distrain, 283, 284.
for interest on rent, 284.
giving right to distrain, 36.
right of distress may be postponed by, 36.
to distrain on other lands than those out of which the rent issues, 192, 194.
between commoners as to distress, 299, 300.
as to waiver of action, 324.
for tenancy when not put in, 325.

AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883,
as to live stock taken in to be fed at a "fair price," 147—149.
meaning of "fair price," 148, 149.
as to agricultural machinery, 145.
compensation in cases of deductions from rent, 177.
distress by landlord for one year's rent under, 180, 181.

AGRICULTURAL MACHINERY,
exemption from distress under Agricultural Holdings (England) Act, 1883..145.

ALLOTMENTS,
under the Inclosure Acts, 51.

ALMANACK,
evidence of, as to meaning of sunrise and sunset, 184.

AMBASSADORS,
exemption from distress, 118.
as to their domestics, 118.

AMOUNT,
of rent necessary for tender, 294.
of rent for which a distress may be made, 171—174.
must not be for more rent than is due, 171.
where the rent consists of several amounts, 172.
where different properties are included in the same lease, 171.
where the rent is entire, 172, 173.
under the Agricultural Holdings (England) Act, 1883..180, 181.

ANIMALS,
ferœ naturæ, when privileged from distress, 141.

ANNEXATION,
what degree of, necessary to constitute a fixture, 122, 123.
machinery annexed to soil deemed to be trade fixture, 122.

ANNUITANTS,
distress by, 66, 67.
where a term vests in trustees to the use of, 66.
as to tenants in dower and freebench, 54.

ANNUITIES,
cannot in general be distrained for, 66.
distinguishable from rent-charges, 66.
where vested in trustees for a term, 66, 67.
where payable out of freeholds and leaseholds, 66, 67.
when distress for arrears of, may be made, 180.
in case of underlease of a chattel, 62.

ANVIL,
smith's, when privileged from distress, 121.

APPAREL,
wearing, exemption of, on sale of distress under justices' warrant, 400.
exemption under Law of Distress Amendment Act, 1888..119, 140, 146, 163, 188.

APPEAL,
agreement not to, in replevin, 364.
against a parish rate, 390.
against an order for restoration of railway rolling stock, 152, 153.
against a distress for highway rates, 394.
against an order for restoration of live stock, 150.
against a distress by justices, 403, 404.
costs of, 409, 410.
in County Court actions of replevin, 364.
in case of fraudulent removal, 203.
costs of, 203.
how affected by Summary Jurisdiction Act, 1879..207.
notice of appeal, 207.
in case of taxes, 405.

APPLICATION,
of proceeds of sale, 264.

APPORTIONMENT (of rent),
definition of, 21.
in respect of estate, 21—25.
as regards rent-service, 21—24.
on the alteration of the lessee's interest, 22.
on purchase of tenancy, 22.
by surrender or forfeiture, 22.
by act of God, 22.
by eviction of lessee, 22.
by person having title paramount, 22.
by severance of lessor's reversion, 23.
by act of law, 23.
by act of the parties, 23.
provisions of the Conveyancing Act, 1881..23, 24.
as regards a rent-charge, 24, 25.
difference between a rent-charge and a rent-service, 25.
effect of 22 & 23 Vict. c. 35, s. 10..25.
in respect of time, 26—28.
at common law, 26.
Clun's Case, 26.
remedies given by 11 Geo. II. c. 19, s. 15..26.
remedies given by 4 & 5 Will. IV. c. 22..26.
Apportionment Act, 1870..26—28.

APPRAISEMENT,
of a distress, 242—248.
must be stamped, 245.
penalty for not stamping, 245.
stamp duties, 245.
number of appraisers required in, 246.
landlord cannot sell before, 246.
sale without, irregular, 246, 328, 330.
does not of itself take away right to replevy, 248.
measure of damages for selling goods without, 330.
for taxes, 396.
appraised price only *primâ facie* evidence of value of goods, 254.
view and valuation, 248.
when not required under the Distress Act, 1888..244, 245.
costs of appraisement, 244, 245, 256, 257.

APPRAISERS,
need not be sworn, 243, 246.
number required, 243, 246.
not necessary, unless required, 244, 245.
sale by, when irregular, 247, 330.
must be competent and disinterested, 247.
who are interested parties, 247.
need not be professional, 247.
distrainor may not appraise, 247.
formalities may be dispensed with, 248.
valuation of goods by, 248.
should sign the appraisement, 248.
under the Distress Act, 1888..244, 245.

ARREARS (of rent),
what landlord can claim against execution creditor, 142, 266, 267.
recoverable under Agricultural Holdings (England) Act, 1883.. 180, 181.
when rent is "in arrear," 164.

ASSENT,
to impounding, 239.

ASSIGNMENT,
by reversioners, 40.
how it affects right to distrain, 41, 42.
of goods to trustees, how it affects replevin, 348, 349.

ASSISTANCE,
in case of fraudulent removal, 201—204.

ASSIZE,
rents of, 17.

ATTORNMENT,
tenant by elegit can distrain without, 55.
where there are two clauses of, in bankruptcy, 88, 89.
when deemed to be a bill of sale, 100, 101.
distress under, in a mortgage, 88, 91, 92, 109, 110.
in case of receivers, 79, 80.
in case of partners, 88, 89.
sham rents in attornment clauses, 96—98.
uncertainty of rent in attornment clauses, 98, 99.
application for leave to distrain in case of attornment clause, 113.

AUCTION,
public, sale by, on distress under justice's warrant, 411.
in case of taxes, 396.
price realised at a sale by, *primâ facie* evidence of value, 255, 331.
removal of goods to auction room under Distress Act, 1888..239, 244, 245.
costs of, 256, 257.

AUCTIONEER,
definition of an, 135.
need not have licence where distress under 20*l.*, 254.
goods delivered to an, privileged, 134, 135.
liability of, for goods in his hands, 136.
refusal by, to deliver up goods, 340.
when entitled to set up a "*jus tertii*," 341.

AUTHORITY,
private receiver must have express, to distrain, 79.
in case of the assignee of a mortgage, 79, 80.
of bailiff to receive rent and costs, 79, 292.
what is evidence of authority to distrain, 209.

AVOWRY,
in actions of replevin, 366.

AXE,
in a man's hand is privileged from distress, 139.
of a carpenter is conditionally privileged, 150.

BACKING
a warrant, on commitment to prison by justices, 403.

BAILIFF,
distress damage feasant by a, 308.
cannot sell for payment of fees, where landlord has withdrawn, 262.
in cases of replevin, 350, 351.
cannot act as an appraiser, 247.
authority of a, to accept tender, 82, 292.
cannot be limited by landlord, 292.
is not the "person levying the distress," 251, 260, 261.
misconduct of, 211.
where tender of rent to a, is insufficient, 293.
authority of a, to distrain, 207—213.
power of mortgagor in possession to distrain as a, 210.
appointment of a, by joint-tenants, 48, 215.
rights of executors and administrators under 32 Hen. VIII. c. 37, s. 1..60.
bailiffs under the Statute of Westminster II., 207, note (*s*).
goods in the hands of a, are privileged, 142.
corporations aggregate may appoint without deed a, 85.
when landlord liable for acts of his, 208—210.
receivers and agents are considered as, 79.
must give a copy of his charges, 261, 262.
as to embezzlement by a, 209, 210.
an infant cannot be appointed a, 207.
of mortgagee, justification by mortgagor as, 90.

BAILIFF—*continued.*
appointment of, under the Law of Distress Amendment Act, 1888.. 207, 208, 210, 211.
certificates of, 207, 208, 212, 213.
special certificate, 212.
general certificate, 212.
cancellation of, 213.
security, 212, 213.
fees for, 213.
costs of, 257.

BANKRUPTCY,
distress in case of, 93—103.
landlord's power of distress under, 93, 94.
where goods in custody of receiver in bankruptcy, 80.
provisions of the Bankruptcy Act, 1883..93—96.
landlord's rights where goods are removed from premises, 94.
where he allows goods to remain on premises, 94.
only extend to goods of bankrupt, 95, 96.
where he has elected to take his remedy by proof, 99.
sham rents in attornment clauses, 96—99.
rights of a stranger who pays out a distress, 96.
goods under a distress are not in the "order or disposition" of the bankrupt, 100.
provisions of the Bills of Sale Act, 1878..100.
second distress in case of, 101, 102.
as to payment by an under-lessee, 103.
effect of bankrupt obtaining his certificate, 103.
of constable, possessed of goods levied under a distress, 103.
goods seized by a messenger under a, 143.
fraudulent removal of goods where lessee is bankrupt, 200.
warrant of commitment in case of distress for poor rates in, 386.

BAR,
entry by pulling out the bar of a door, 219.

BARGAIN AND SALE,
reservation of rent-service on a, 7.

BARNS,
entry by breaking open a barn-door, 219.

BEASTS,
of the plough, when privileged from distress, 146, 147.
action for wrongful distress of, 332.

BEDDING,
exemption of, under the Law of Distress Amendment Act, 1888.. 119, 140, 146, 163, 188.

BENEFICIAL
enjoyment of premises in winding up of companies, 105—111.

BILL OF EXCHANGE,
effect of taking a, for rent, 285, 286.

BILL OF SALE,
when an attornment is deemed to be a, 100, 101.
liability of goods on premises after fictitious, 142, 143.
does not protect chattels against distress for poor rates, 382, 383.

BIRDS,
in a cage, when privileged from distress, 141.

BISHOP,
sequestration by a, 86.

BOAT,
when privileged from distress, 128, 131.

BOND,
in replevin, 343, 353, 354, 355, 364, 372.
recovery of sum deposited in lieu of, in replevin, 353, 373.

BOOKS,
of a scholar, when privileged from distress, 150.

BREWERS' CASKS,
when privileged from distress, 133.

BROKER,
indemnity to, 216—218.
liability of landlord for acts of his, 208, 209.
on re-entry must confine himself to same goods, 223.
must give a copy of his charges, 257, 261, 262.
undertaking to indemnify, does not require an agreement stamp, 218.
tender to a, 292.
charges of a, in distress for poor rates, 354.
costs of, 257, 259, 260.

CANARIES,
may be distrained, 141.

CAPIAS IN WITHERNAM,
writ of, 343, 367, 368.

CARCASE
of a beast, when privileged from distress, 126.

CARRIAGES,
standing at livery, are liable to be distrained, 128.
sent to a coachmaker to be sold, when privileged, 134.

CART COLTS,
when privileged from distress, 147.

CASKS,
of a brewer, when liable to distress, 133.

CATALOGUE,
expenses of, on a distress, 257.

CATS,
cannot be distrained, 141.

CATTLE,
when distrainable damage feasant, 302—304.
obligation of owner to remove straying cattle, 303, 304.
obligation to keep up fences, 304, 305.
impounding of, 236, 240, 241.
supply of food to, 231.
must generally be impounded on the premises, 238.
levancy and couchancy, 303.
on their way to a fair, privileged, 127, 300, 301.
at an inn, when privileged, 136.
on a common, distress of, 196.
where driven off to avoid a distress, 196, 197.
of strangers, when liable to distress, 116.
unless they hold by title paramount, 116.
taken in, to be fed at "fair price," 148, 149.

CERTAIN RENT, 4—6, 33—35.

CERTIFICATE,
by chief clerk, how it affects right to distrain, 81.
in case of bankruptcy, effect of, 103.
of bankrupt, as regards poor rates, 356.
of bailiffs, 207, 208, 211—213.
special certificate, 212.
general certificate, 212.
security, 212, 213.
cancellation of certificate, 213.
fees for certificate, 213.

CERTIORARI,
removal by, in actions of replevin, 352, 369, 370.
in case of distress for poor rates, 393.

CHANCERY (Court of),
powers of receivers appointed by, 80.
receivers have same powers as sequestrators, 86.

CHARGES,
of a distress for rent. (*See* COSTS.)

CHARTERS,
when privileged from distress, 120.

CHATTELS,
bequests of, 62.

CHIEF CLERK,
certificate of, how it affects right to distrain, 81.

CHIEF RENTS, 17.

CHURCHWARDENS,
distress by, 86.

CLANDESTINE
removal of goods may be fraudulent, 199.
removal must always be pleaded specially, 200.
murder in case of, 202.

COGNIZANCE,
in action of replevin, 366.

CO-HEIRS IN GAVELKIND,
distress by, 47.
may join in signing a distress warrant, 215.
are parceners by custom, 47.

COLLECTOR,
distress by, for taxes, 395.
where they advance duties, 396, 397.

COLOUR OF RIGHT,
by owners of cattle on commons, 64, 65.

COMMISSION,
expenses of, on a distress, 257.

COMMITTAL (to prison),
in case of fraudulent removal, 203, 206.
on non-payment of poor rates, 374, 386, 387.
to enforce orders and convictions of justices, 397, 398, 401, 402, 405, 406.
in case of rescue of animals from pound, 318, 319.
on non-payment of taxes, 397, 398.

COMMITTEES (of lunatics),
powers of distress by, 77.

COMMON,
distress of cattle on a, 195, 196.
extinguishment of rights of, 65, 66.
rent cannot issue out of a, 3.
inclosure of, 65.
colour of right by owners of cattle on a, 64, 65, 299.
summary remedy for tithes in case of commons in gross, 74, 75.
surcharge of a, 299.

COMMON LAW PROCEDURE ACT, 1852,
as to ejectment, 190, 191.

COMMON RIGHT,
rents distrainable of, 19.
distress incident to a rent-service of, 6.
distress now incident to all rents of, 20.
lords of manors may distrain of, 63.
as to copyhold rents, 6, 17.
as to a rent assigned for equality of partition, 46.

COMMONERS,
distress by, 64.
distress damage feasant by, 298—300.
commoners' rights *inter se* for damage feasant, 64.
where the common is absolutely stinted, 64, 65.
no distress where there is a colour of right, 64, 65, 298.
where a commoner claims by custom, 65.
restraint of a distress between, 65.
extinguishment of rights of common, 65, 66.
effect of 11 Geo. II. c. 19, s. 8 . . 66.
right of distress in case of inclosure of a common, 65.
right of distress may be given by agreement between, 299, 300.

COMMUTATION (of tithes),
how effected, 70, 71.

COMPANIES,
distress on the winding-up of, 103—113.
provisions of the Companies Act, 1862 . . 103—111.
stay of proceedings, 104.
sects. 85, 87, and 163 must be read together, 104—106.
the Companies Acts and the Judicature Act, 1875, s. 16, distinguished, 93, 105.
rule as to rent accrued before and after the winding-up, 106.
distress where premises retained for the convenience of the winding-up, 106—111.
marshalling of property where a lessor exercises his express and legal rights simultaneously, 112.
where provisional liquidator appointed, 110.

COMPENSATION,
warrant for recovery of, 398 *et seq.*
in the nature of a rent, 30, note (*e*).
recovery of, for food supplied to animals in pound, 232, 233.

COMPETENCY,
of appraisers, 246, 247.

COMPETITION
between the Crown and a subject, 83, 117, 118.

COMPLAINT,
on distress for poor rates, 377, 378.

COMPULSORY SALE, 251.

CONCEALMENT,
not necessary to be shown in case of fraudulent removal, 202.

CONDITION PRECEDENT,
rent payable on a, 170.
to a sale, that notice be given of taking and cause, 229.
that appraisement be made, 246.
right to distrain taken away by non-performance of a, 282.

CONDITIONAL
privilege from distress, 146—151.

CONSENT,
by tenant that goods shall remain with distrainor until sale, 252, 253.
as to coparceners, 45.
by landlord that stranger's cattle shall be exempt from distress, 151.

CONSOLIDATION.
of proceedings for the recovery of rates, 378.

CONSTABLE,
bankruptcy of, when possessed of goods seized under a distress, 103.
powers of, in Metropolitan Police District, 201.

CONSTABLE—*continued.*
payment or tender to, under justice's warrant, 404, 405.
duty of, 404.
liability of, 405.
when he may be called in, 405.
when he may be called in in case of fraudulent removal, 201.
when he may be called in in distress for rent, 223, 224.
as to a special, 201.
fines on, 396, 405.

CONSTRUCTIVE SEIZURE,
of fixtures, 123.
on distress for rent, 225, 226.

CONVEYANCE,
rent-service must be reserved on a sufficient, 7.

CONVEYANCING ACT, 1881,
in case of reservation of rent, 14.
in case of apportionment of rent, 23, 24.
as regard grantees of rent-charges, 70.

CONVICTION,
distress for enforcement of orders and convictions of justices, 398—413.
order for double value of goods fraudulently removed, is not a, 205.

COPARCENERS,
distress by, 45—47.
must join, or one alone can distrain, 45, 215.
as to replevin by, 45.
after partition several distresses may be made by, 45, 215.
as to rent-charges, 45, 46.
tortious acts of, 46, 47.
unity of seisin in case of, 47.
co-heirs in gavelkind are coparceners by custom, 47.

COPPER
affixed to a dwelling-house, when privileged from distress, 121.

COPY,
of inventory, 227.
of broker's charges, 257, 261, 262.

COPYHOLD RENTS,
are in their very nature rents-service, 6, 17.
rights of widow as to, in freebench, 54.
distress by lords of manors of, 63.
are not within the 32 Hen. VIII. c. 37..59, 63.
they are within the 4 Geo. II. c. 28, s. 5..63.
copyholders cannot be distrained upon for a rent-charge, 116.
rent granted on enfranchisement of, 6, note (*l*).

COPYHOLDER,
when exempted from distress, 116.

CORN,
cut, impounding of, 241.
sale of, 242.

CORN—*continued.*
cocks and sheaves of, when privileged, 137, 138.
can be rendered by way of rent, 2.
privilege of, when sent to a mill to be ground, 127.

CORPORAL SERVICES,
rights of executors and administrators as to, 60.

CORPORATIONS,
distress by, 82—86.
corporations sole, 82—84.
the Crown, 82, 83.
its powers of distress, 83, 84.
corporations aggregate, 84—86.
leases must be under seal, 84, 85.
may appoint a bailiff to distrain without deed or warrant, 85, 86.
are liable in tort for their agents' acts, 85, 86.
quasi-corporations, 86.

COSTS,
of a distress for rent, 256—262.
where under 20*l*...256—259.
remedy in case of irregularity, 257, 258.
treble the amount may be awarded, 258.
where over 20*l*...259—261.
copy of broker's charges, 261, 262.
action for not giving such copy, 261, 262, 331.
of appraisement under Distress Act, 1888..244, 245, 256, 257.
of removal of goods to auction room, 244, 245, 256, 257.
of impounding, 262.
bailiff's remedy for costs where landlord has withdrawn, 262.
in case of excessive charges, 331.
sale of distress damage feasant for expenses of food, 305.
treble, now abolished, 316, 317.
recovery of, for food supplied to animals impounded, 232, 233.
power of sale in default, 233.
in actions of replevin, 352, 363.
of appeal, in case of fraudulent removal, 203.
tender of rent without, 291, 292.
for poor rates, 385, 386, 387, 390.
for highway rates, 393.
in distress by justices, 400, 401, 410, 412.
of broker for poor rates, 385.
for rates, taxes, &c., 259, 396.

CO-SURETY,
right of distress by, 42, 43.

COUNTY,
in what, animals to be impounded, 236, 237.
distress where lands are in different counties, 194.
driving a distress from one county to another, 237, 238, 331.
of what, justices may convict on fraudulent removal, 205.

COUNTY COURT,
claim of rent under an execution of a, 278, 279.
as to stranger's goods, 279.
duty and powers of registrar of, in replevin, 344, 351, 352.

COUNTY COURT—*continued.*
fees payable in replevin, 356, 357.
actions of replevin, 352, 353, 359—364.
costs in, 352, 353, 363.
rules of County Court in, 354—356, 360, 363, 365.
search in, for replevins, 254.
recovery of double rent when under 50*l*...178.
powers of, under the Agricultural Holdings (England) Act, 1883.. 149, 150.
as to appointment of bailiffs, 210—212.

COURT,
powers of receivers appointed by the, 80.

COVENANTS,
restrictive, 145, 255.

COVERT
pounds, 230.

CRIMINAL OFFENCE,
in case of rescue, 315.
not necessary to make a seizure tortious, 335.

CRIMINAL PROSECUTION,
will not lie for an excessive distress, 335.

CROWN,
rights of, as against execution creditor, 267.
can distrain on all lands for rent, 3.
can distrain in highway and common street, 83, 195.
powers of distress by, 83, 84, 117, 118.
in case of underleases by tenants of, 83.
in case of grantees of the Crown, 83, 84, 117.
on lands under a sequestration, 84.
where Crown comes into competition with a subject, 83, 117, 118.
where entitled by office found, 117.
can reserve rent to a stranger, 12, note (*o*).

CROWN DEBT,
no replevin lies for a, 346.

CURTESY,
distress by tenants by the, 54.

CUSTODY OF THE LAW,
things in the, are privileged from distress, 141—145.
until sale, they remain in, 114.
in case of interpleader proceedings, 142.

CUSTOM,
distress in case of devisees by, 61, 62.
right of distress by commoners where there is a, 62.
as to rents in freebench by, 54.
rent payable in advance by, 168, 169.

CUSTOM OF THE COUNTRY,
in case of tenants holding over by, 38, 39.
distress after expiration of tenancy in case of, 53, 186.

DAMAGE,
actual, must be proved in distress on growing crops, 124.
on selling goods before expiration of five days, 252.
in case of distress damage feasant, 298, 305.
in case of irregular distress, 329.
sustained by goods removed to public auction room, 239, 256, 257.

DAMAGE FEASANT,
distress for, 297—310.
definition of, 297.
extends to inanimate things, 297.
distinction between distress for rent and damage feasant, 298.
the animals must be *actually doing damage*, 298.
distress may be made in the night-time, 298.
who may distrain, 298—301, 307.
commoners, 298—300.
tenants in common, 301.
exemptions from distress, 301, 302.
no importance attached to the fact of ownership, 301.
cattle on their way to a fair, 300, 301.
things in actual use, 301, 302.
cattle cannot be taken in a highway, 301.
distress where beasts escape through owner's neglect, 302—306.
meaning of levancy and couchancy, 303.
cattle straying through defects of fences, 304, 305.
for what damage animal can be distrained, 305, 306.
second distress, 306.
remedies for wrongful distress, 306, 307, 309, 310.
in case of pound breach, 306.
form of remedy at election of party injured, 306.
double remedies cannot be maintained at same time, 306.
notice of distress, 307.
abuse of the distress, 307, 308.
makes the distrainer a trespasser *ab initio*, 307.
cannot be sold, 307, 308.
sale of distress for expenses of food, 308.
after tender of amends, 308.
powers of corporations to appoint a bailiff without deed in cases of, 85.
impounding of a distress, 308, 309.
as to an irregular distress, 327.
in case of replevin, 347, 350, 359.

DAMAGES,
measure of, in illegal entry, 221.
on excluding tenant from premises, 330.
on selling goods without appraisement, 248, 330.
on sale of goods by appraiser, 330.
for wrongful distress, 320—322.
for excessive distress, 309.
for irregular distress, 247, 326 *et seq.*, 330.
nominal damages, 329.
in cases taken under execution, 276.
when actual damage must be proved, 252.
in High Court actions of replevin, 365, 367.
special damages, 367.
recoverable under writ of recaption, 370, 371.
treble damages in case of rescue and pound breach, 316.
as to fraudulent removal, 202.

DEATH
of cattle during a distress, 248.
in pound, 235.

DEBTORS ACT, 1869,
in case of appeal against justice's warrant, 410.

DECLARATION,
under the Lodgers' Goods Protection Act, 1871..156, 162.

DEDUCTIONS,
from rent, 174—177.
when tenant may make deductions, 175.
should be deducted from the current year, 175.
ground rent, 174.
rent-charge, 175.
property tax, 176.
land tax, 176.
rates, 176.
tithe rent-charge, 176.
compensation under Agricultural Holdings (England) Act, 1883..177.
in case of tender, 294.
of costs on sale under justice's warrant, 412.
by mistake, 39, 40.

DEED,
when necessary for the creation of a rent-charge, 15.
necessary for demise of tithes, 75.

DEER,
replevin of, 348.
when privileged from distress, 141.

DEFEASANCE,
of replevin bond, 372.

DEFENCE,
special, under 11 Geo. II. c. 19, s. 21..333.
in High Court actions of replevin, 366.

DEMAND,
of rent, when necessary previous to a distress, 164, 165, 181—183.
where power of distress after demand, 182.
distinction between distress and re-entry as to, 164.
what is a "legal" demand, 183, 184.
of admittance necessary in re-entry, 222.
entire, cannot be split, 287.
in ejectment, 190, 191.
in case of tender, 182.
of a poor rate, 376, 377.
where not necessary before issuing distress warrant by justices, 408.
where trover can be brought without, 332.
refusal of auctioneer to deliver up goods on, 341.
under Law of Distress Amendment Act, 1888..146, 151, 188.

DEMESNE,
distress must be made whilst in possession of tenant in, 59.

DEMISE,
by churchwardens and overseers, 86.
by joint tenants, 49.
must be by deed if of tithes, 75.
when an instrument amounts to a present, 8—11.
actual, at a fixed rent, 29—32, 281.
where a licence not sufficient to constitute a, 5, 34.
in case of penalties, 5, 35, 36.

DEPUTIES,
of sheriff, jurisdiction in replevin, 350.

DESTRUCTION
of animals in the pound, 234, 235.

DEVISEES,
distress by, 61—63.
by custom, 61, 62.
distinction between a devise and a legacy, 62.

DISCLAIMER,
waiver of, 190.

DISCRETION,
must be used on sale of a distress, 234.

DISPOSAL (or use),
of a distress, 235, 307, 314, 328.

DISTRESS,
what constitutes a, 224, 225.
is not confined to landlords and tenants, 29.
by whom it may or may not be made, 29—113.
express agreement giving right to distrain, 35.
right of, may be postponed by agreement, 36.
where there is an acknowledgment of an antecedent tenancy, 36.
remains until complete surrender, 36, 37.
distrainor must look to the land and not to the person, 114.
all goods on premises (subject to exceptions) liable to, 114.
immaterial in whose possession premises are at time of, 114.
is incident of common right to a rent-service, 6.
now incident to every species of rent, 20.
power of, implies an antecedent right of action, 29.
distinction between executions and distresses as regards fixtures, 120.
amount of rent for which a, may be made, 171—174.
demand of rent previous to a, 164, 165, 181—184.
Statutes of Limitation as to, 178—181.
when to be made, as to time, 184—192.
where to be made, 192—196.
how to be made, 207—265.
distress warrant, as to rent, 214—216.
as to poor rates, 379—393.
as to highway rates, 393, 394.
as to justices, 398, 399, 402—404, 407, 408.
after expiration of tenancy, 53, 185—188.
waiver by, 189.
on a highway or common street, 194.
wrongful, 320—326.
notice of a, 227—229.

DISTRESS—*continued.*
appraisement of a, 242—248.
damage feasant, 297, 310.
distinction between distress for rent and damage feasant, 298.
expenses of a, 256—262.
seizure of a, 224—226.
irregular, 247, 326—334.
inventory of a, 226—228.
excessive, 334—341.
sale of a, 248—256.
impounding a, 229—242.
surplus proceeds of a, 262—265.
on possession limited by statute, 118.
of trespassing cattle, 302—306.
treated in light of a pledge, 146, 242.
goods privileged from, 119—151.
goods privileged by statute, 151—163.
proceedings in a distress for rent, 164—265.
in case of bankruptcy, 93—103.
in case of mortgages, 87—93.
in case of the winding-up of companies, 103—113.
on stranger's goods, 116, 314.
in case of fraudulent removal, 200.
for poor rates, 374—393.
for highway rates, 393, 394.
for taxes, 395—398.
on convictions of justices, 398—413.
in case of fraudulent removal, 196—207.
void *ab initio*, 321—323.
persons exempted from, 115—119.
by what means it may be taken away, 281—296.
second distress, 286—291.
restraint by injunction of a, 295, 296.

DISTRESS WARRANT,
for rent, 214, 215.
for poor rates, 379—393.
for highway rates, 393, 394.
for taxes, 395—398.
as to justices, 398, 399, 402—404, 407, 408.
must specify time when distress to be sold, 381.

DOGS,
when privileged from distress, 139, 302.

DOOR,
breaking open a, 218, 220.

DOUBLE COSTS, 72.

DOUBLE REMEDIES,
in actions for distress damage feasant, 306.
in case of executions on same goods, 268.

DOUBLE RENT,
provisions of 11 Geo. II. c. 19, s. 18..38, 177.
recoverable by distress or by action, 177.
where amount does not exceed 50*l.*, recoverable in County Court, 178.
acceptance of single instead of, 284.

DOUBLE VALUE,
recovery under 2 Will. & Mary, sess. 1, c. 5..323.
recovery under 11 Geo. II. c. 19, s. 3..202.

DOWER. (*See also* TENANTS IN DOWER.)
annuities in case of, 54, 55.
distress by tenants in, 54, 55.

DUE,
when rent is, 164—168.

DUTIES
of the distrainor as to impounding goods, 238, 239.

EJECTMENT,
as to distress, 37, 38.
as to whether demand of rent necessary in, 164, 190.
provisions of the Common Law Procedure Act, 1852, as to, 191.
meaning of "no sufficient distress on the premises," 191, 192.
strict search must be made on the premises, 191, 192.
of tenant by mortgagee, 91, 92.

ELECTION,
of remedy in case of excessive distress, 336.
of remedy in case of damage feasant, 306.
by landlord to take his remedy by proof, 99.

ELEGIT (tenants by),
distress by, 55.

ELOIGNMENT,
of goods in a replevin, 343.

EMBEZZLEMENT,
when a bailiff is a "clerk or servant," and may be found guilty of, 209, 210.

ENGINE,
when privileged from distress, 153.

ENGLISH COURTS,
execution of warrant of distress in, 412, 413.

ENROLMENT,
of a rent-charge, 15.

ENTIRE,
amount of rent distrainable where rent is, 172, 173.

ENTRY,
in distress for rent, 218—221.
outer door cannot be broken open, 218.
except in case of fraudulent removal, 218.
but when outer door open, inner door may be broken open, 218.
mode in which outer door may be opened, 219.

ENTRY—*continued.*
illegal, 219—221.
by opening a window fastened with a hasp, 219.
by entering through a window which is shut but not fastened, 219.
by climbing over a fence, 221.
forcible entry, 221, 223, 224.
measure of damages in, 221.
legal, 219—221.
through an open window, 221.
by opening a door closed but not fastened, 220.
by raising a window already open, 221.
into a pound to supply animals with food, 232.
re-entry, 221—224.
of plaint in replevin, 359.
right of, where tithe rent-charge in arrear, 72—74.

ESCAPE
from pound, 235.

ESCHEAT,
distress by lords of manors by, 63, 64.

ESTATE,
apportionment of rent in respect of, 21—25.

ESTOPPEL,
where a receiver makes a lease without authority, 79.
as to executors, 60.

EVICTION,
of lessee, apportionment of rent-service on, 22.
by title paramount, how it affects right of distress, 37, 38, 115.

EVIDENCE,
of authority to distrain, 209, 214, 215.
of a poor rate, 376.
in County Court actions of replevin, 361.
appraised price is only *primâ facie* evidence of value of goods, 254.
price realised at auction *primâ facie* evidence of value, 255, 331.
to prove an agreement, 325.
under the 11 Geo. II. c. 19..332.
required in action for excessive distress, 339.
may be given that goods have been improperly sold, 254.
of tenant's acts in fraudulent removal, 204.
of landlord's adoption of bailiff's illegal acts, 208.

EXCESSIVE CHARGES,
action against distrainor for taking, 331.

EXCESSIVE DISTRESS,
at common law, 334.
by statute, 334.
forms of action for, 334, 335.
when trespass maintainable for, 334, 336.
criminal prosecution does not lie for an, 335.
what is "excessive," 335, 336.
action, where wrongful as well as excessive, 336.
plaintiff must have a property in the goods, 336, 337.
special property, 337.

EXCESSIVE DISTRESS—*continued.*
agreements between distrainor and distrainee, 337.
measure of damages in case of corn, 337—339.
what must be proved in action for, 339.
mode of calculating value of goods, 339, 340.
joint actions for, 341.

EXCLUSION,
of tenant from the premises, 238—240.
measure of damages in case of, 330.

EXCLUSIVE,
jurisdiction to grant replevins, 344, note (*l*), 356, 359.

EXECUTION,
rent-service in case of tenants under an, 55.
goods under an, when privileged, 140—145.
for plaintiff in High Court action of replevin, 367.
for defendant in High Court action of replevin, 367.
distinction between distress and execution as regards fixtures, 120.
of a warrant of distress by justices, 403.
of a warrant in English and Scotch courts, 412, 413.
distress by tenants under an, 55.

EXECUTION CREDITOR,
satisfaction of arrears of rent by, 266—280.
claim of rent by landlord under 8 Anne, c. 14..142, 266, 270.
in case of a weekly tenancy, 267.
cases decided under the 8 Anne, c. 14..267—271.
persons who come within the statute, 268.
double executions on the same goods, 268.
in case of a fraudulent bill of sale, 268.
goods may not be removed till a year's rent is paid, 269.
wrongful removal of goods, 269.
what rent the landlord is entitled to, 271, 272.
executors and administrators, when entitled under the statute, 273.
liability of sheriff for rent, 270, 272, 273.
notice to sheriff, 274, 275.
notice to the execution creditor is unnecessary, 275.
sheriff's duties, 275, 276.
poundage, 276.
discharge of sheriff, 276.
the amount of rent may be disputed, 276.
deduction of one year's rent on distress for taxes, 276, 277.
executions under County Court process, 278, 279.
as to the goods of a stranger, 279.
executions under Admiralty process, 279, 280.

EXECUTORS,
distress by, 57—61.
in underleases, 57.
distress under 32 Hen. VIII. c. 37, s. 1..57, 58, 59, 60.
distress under 3 & 4 Will. IV. c. 42, s. 37..58, 59.
on whose possession they may distrain, 59, 60.
estoppel between, 60.
cognizance by bailiffs, 60.
rights of executors and administrators *inter se*, 60, 61.
time when an executor may distrain, 61.

EXECUTORS—*continued.*
replevin by, 349.
when entitled to rent under 8 Anne, c. 14..273.

EXEMPTIONS FROM DISTRESS,
of persons, 114—119.
of goods, 119—163.
in case of damage feasant, 301.
as regards agents, 126.

EX PARTE,
power of justices to proceed, on distress for poor rates, 382.

EXPENSES,
of a distress for rent. (*See* COSTS.)
of removal of goods to public auction room, 239.

EXPIRATION,
of tenancy, distress after, 53, 185—188.
under Law of Distress Amendment Act, 1888..146, 151, 188, 249—251.

EXTINCTION,
of rent, 22, 282.

FACTOR,
definition of, 135.
goods delivered to a, privileged from distress, 134—136.

FAIR,
rent cannot issue out of a, 3.
cattle on their way to a, privileged from distress, 127, 300.

FAIR PRICE,
exemption of live stock to be fed at a, 148, 149.

FEE,
distress cannot be taken out of a, 193.
remedy, 322.

FEE-FARM RENT,
definition of, 16.
effect of creation before and after the Statute Quia Emptores, 17.
how affected by the 4 Geo. II. c. 28, s. 22..17.

FEES,
for brokers, 257, 259, 260.
for bailiff's certificates, 213.
scale of, under Distress Act, 1888..259, 260.
County Court payable in Replevin, 356, 357.

FENCE,
obligation to keep up a, 304, 305.
entry by climbing over a, 221.
distress of cattle straying by defects in a, 303, 304.

FERÆ NATURÆ,
animals, when privileged from distress, 141.

FERRETS,
when privileged from distress, 139.
in case of damage feasant by, 302.

FEUDS, 1.

FIXTURES,
exemption from distress of, 120, 121.
distinction between distresses and executions as to, 120.
what degree of annexation necessary to constitute, 122, 123.
liability of landlord on severance of, 123.
constructive seizure of, 123.
action for severing, 330.
replevin does not lie for, 348.
machinery, when deemed to be trade, 122.

FLESH,
of animals, when privileged from distress, 126, 137.

FOOD,
liability to supply cattle in pound with, 231, 232.
entry into a pound to supply animals with, 232.
recovery of compensation for food supplied, 233.

FORCE,
actual, not necessary to constitute pound breach, 312, 313.
entry by, 219—221.
measure of damages on, 221.

FOREHAND RENTS. (*See* RENT PAYABLE IN ADVANCE.)
how affected by the 8 Anne, c. 14..271.

FORFEITURE,
as regards apportionment of a rent-service, 22.
waiver of, 188, 189.
distinction between waiver by distress and waiver of forfeiture, 189.
of bailiffs' certificates, 213.

FORM,
of action in distress, damage feasant, 306.
in irregular distress, 328, 329.
in wrongful distress, 320.
in excessive distress, 334—336.
(For forms of proceedings in distress, replevin, &c., see Appendices.)

FRAMES,
used in woollen manufactories, when privileged from distress, 154, 155.

FRANCHISE,
rent cannot issue out of a, 3.
exclusive jurisdiction to grant replevins in case of a, 344, n. (*l*), 356.

FRANKALMOIGN,
rent under tenure of, 6.

FRAUDULENT REMOVAL,
provisions of the 8 Anne, c. 14, s. 2..196.
landlord can follow and distrain within five days, 196.

FRAUDULENT REMOVAL—*continued.*
provisions of the 11 Geo. II. c. 19..196—198.
landlord can follow and distrain within thirty days, 196, 197.
exception in favour of *bonâ fide* purchaser, 197.
power to break open barns, &c., 197, 198.
as to the removal, 198—200.
clandestine removal, 199, 200.
in case of lessee's bankruptcy, 200, 201.
calling in a police-constable to assist, 201.
distress in the Metropolitan Police District, 201.
treble damages in case of rescue, 202.
remedies in case of, 202—207.
recovery of double value, 202.
where goods worth less than 50*l*...202, 203.
appeal, 203.

FREEBENCH,
distress by tenants in, 54.

FREEHOLD,
exemption from distress of things annexed to the, 120.
as to growing crops under 11 Geo. II. c. 19..123—125.

FRONT DOOR,
entry through the, 219.

FRUIT,
when privileged from distress, 137.

FURNISHED LODGINGS,
rent can be distrained for on demise of, 3.

FURNITURE,
distress on, under hire purchase system, 226.

FUTURE LEASES,
agreements for, 7—11.

GALE RENTS, 167.

GAS,
fittings, when privileged from distress, 120.
companies, right of distress in case of bankruptcy, 95, 99, 100.
payments to, are not rent, 95.
meters, now liable to distress, 155, 156.
stove, when privileged from distress, 155, 156.

GATES,
entry by breaking open, 219.

GAVELKIND,
right of distress by co-heirs in, 47.

GENERAL CERTIFICATE,
for bailiffs, 212.

GOODS,
of a lodger, when privileged from distress, 156—162.
of a lodger in case of distress for poor rates, 375, 376.
removal of, to public auction room, 239, 244, 245.
costs of, 256, 257.
what is evidence of value of, 255, 331.
indemnity where broker takes goods privileged from distress, 217, 218.
undertaking to indemnify does not require a stamp, 218.
all, on premises liable to distress, 114.
broker who re-enters should confine himself to same, 223.
of a bankrupt, landlord's power over, 93—95, 99.
what are bankrupt's goods, 96.
in possession of a receiver, 79, 80, 94.
removal of, from the premises before sale, 252, 253.
fraudulent removal of, 196—207.
privileged from distress, 119—163.
by statute, 151—163.
at an inn, when privileged, 136, 137.
exemption of goods delivered to a person in the way of his trade, 125 *et seq.*
exemption of things employed in carrying and fetching away, 127.
of stranger, as regards distress, 114, 116.

GRACE,
time of, allowed for rent, 167, 168.

GRANARY,
goods deposited in a, when privileged, 135.
whether a fixture or not, 122.

GRANTEES,
of rent-charges, their rights of distress, 68—70.
of the Crown, their rights of distress, 83, 84, 117, 118.

GRASS,
cannot constitute a rent, 3.

GRATES,
when privileged from distress, 121.

GROUND RENT,
deduction of, from rent, 174.

GROWING CROPS,
when privileged from distress, 123, 124.
actual damage must be proved on distress of, 124.
action for selling unripe, 331.
replevin of, 348.
distress of, after expiration of tenancy, 53, 186.
when liable to be seized under an execution, 144.
seizure of, when subject to a restrictive covenant, 144, 145
sale of, 143.

GUARDIANS,
their powers of distress, 76, 77.
under the Guardianship of Infants Act, 1886.. 6
leases by, 76.
of a union, excessive payments by, 381.

GUESTS,
temporary, at an inn, when their goods are privileged, 137.

HASP,
entry through window fastened by a, 219.

HAY,
distress of, 138, 139.

HEIRS. (*See also* Co-heirs in Gavelkind.)
distress by, 56, 57.
may distrain for *nomine pœnæ*, 56.

HERBAGE,
cannot constitute a rent, 3.

HIGH COURT,
actions of replevin, 351, 364—370.

HIGHWAY,
remedies when distress on the, 322.
distress cannot be taken on the, 194, 195.
exceptions, 195, 196.
distress damage feasant cannot be taken on the, 301.

HIGHWAY RATES,
distress for, 393, 394.
recoverable in same manner as poor rates, 393.
Summary Jurisdiction Act, 1879, does not apply to, 393.
recovery of costs, 259, 393.
warrant of distress for, 393.
payment or tender of rate, 394.
stay of proceedings, 394.
appeal against, 394.

HIRE PURCHASE SYSTEM,
distress as to, 226.

HOMICIDE,
in case of clandestine removal, 202.

HONOR,
exclusive jurisdiction of granting replevin in case of an, 344, note (*l*), 356.

HORSES,
can be rendered by way of rent, 2.
straying on a turnpike road not liable to be impounded, 241.
when privileged from distress, 127, 128, 137.
standing at livery are liable to be distrained, 127, 128.

HOUSES,
collector may break open, for taxes, 395.

HUNDRED,
rent cannot issue out of a, 3.

HUSBANDRY,
instruments of, when privileged from distress, 147.

HUSBANDS AND WIVES,
their powers of distress, 77, 78.
enlargement of husband's rights by 32 Hen. VIII. c. 37..78.
as to the Married Women's Property Act, 1882..78.

ILLEGAL ACTS,
of bailiff and broker, 219—221.
distinction between irregular and illegal acts, 219.

ILLEGAL DISTRESS,
under the Lodgers' Goods Protection Act, 1871..156, 157. (*See* WRONGFUL DISTRESS.)

ILLEGAL ENTRY, 218—221.

IMPLEMENTS,
of trade, when privileged from distress, 150, 151.
husbandry, 147.

IMPOUNDING,
at common law, 229.
how altered by 2 Will. & Mary, c. 5..230.
different kinds of pounds, 230.
pound overt, 230.
pound covert, 230.
distinction between the different kinds of pounds, 230, 231.
public and private pounds, 231.
liability to supply food to animals in pound, 231.
power to enter into a pound to supply animals with food, 232.
compensation for food and water supplied, 233.
power to sell animals for cost of food, 232, 233.
state of the pound, 234.
must be in a fit state, 234.
applies to inanimate things, 234.
liability of distrainor where cattle are stolen, 234, 235.
where beasts injured whilst in pound, 234.
where beasts injured by act of God, 235.
escape from the pound, 235.
abuse of the distress when in the pound, 235.
exception in case of milch kine, 235.
liability of pound keeper, 231, 235, 236.
place where a distress can be impounded, 236—239.
impounding *on* the premises, 238, 241.
what is an impounding, 239, 240.
assent to impounding, 239.
the distrainor cannot lock up the whole of the premises, 238, 240.
an open field is a sufficient pound for cattle, 240.
horses straying on a turnpike road not liable to be impounded, 241.
corn cut, impounding of, 241, 242.
sale of, 242.
what must be impounded on the premises, 240, 241.
costs of impounding, 262.
of cattle, 241.
tender before and after, 293, 294.
rescue before, 312, 314.
of a distress damage feasant, 308, 309.
remedy for not properly impounding a distress, 327.

IMPROPER RESERVATIONS,
of rent, 12, 13.

INANIMATE THINGS,
distress of, damage feasant, 297.
impounding of, 234.

INCLOSURE ACTS,
allotments as to tenants in common under the, 51.

INCORPOREAL HEREDITAMENTS,
rent cannot issue out of, 3.

INDEMNITY,
to broker, 216—218.
how far it extends to illegal or irregular acts, 216, 217.
where broker takes goods privileged from distress, 217, 218.
under the 5 & 6 Vict. c. 97..72.
undertaking for, does not require a stamp, 218.

INFANTS,
cannot be appointed bailiffs, 207.
leases by guardians of, 76.
distress by guardians of, 76, 77.
under the Guardianship of Infants Act, 1886..76.

INJUNCTION,
restraining a distress by, 11, 295, 296.
restraining mortgagor who interferes with receiver, 81.

INJURY,
to cattle whilst in pound, 234, 235.

INN,
exemption from distress of goods in an, 136, 137.
they must be within the premises, 137.
only extends to temporary guests, 137.

INNER DOOR,
may be broken open where the outer door is open, 218, 219.

INSTRUMENTS,
of a man's trade or profession, when privileged, 150, 151.
of husbandry, when privileged, 147.

INTERESSE TERMINI,
how it affects the right to distrain, 41.

INTEREST,
agreements for interest on rent, how it affects the right to distrain, 284.

INTERPLEADER,
distress where interpleader proceedings pending, 142.

INVENTORY,
of goods distrained, 226—229.
copy of, 227.
notice of, 227—229.
service of, 227.
appraisement usually written on the, 248.
under the Lodgers' Goods Protection Act, 1871..156.

IRREGULAR,
acts of bailiff, liability of landlord for, 208—210.
distinction between illegal and irregular acts, 209.

IRREGULAR DISTRESS,
what is an, 326.
how altered by the 11 Geo. II. c. 19..326, 327.
construction of this statute, 327, 328, 329.
forms of action for, 328, 329, 330.
damages recoverable for, 326, 327, 329, 330.
instances of irregularity, 326, 329—331.
who to make parties to the action, 332.
special defence under 11 Geo. II. c. 19, s. 21..332, 333.
plea of not guilty by statute, 333.
party guilty of an, is no longer a trespasser *ab initio*, 326, 327.
tender of amends after an, 327.
sale by appraisers, when irregular, 247, 330.

IRREGULARITY,
instance of, in irregular distress, 326, 329—331.

JOINT ACTIONS
for an excessive distress, 341.

JOINT OWNERS
in replevin, 349.

JOINT TENANTS,
distress by, 47—50.
severance of the estate of, 48, 49.
tortious acts of, 48, 49.
demise by, 49, 50.
when exempted from distress, 116.
replevin by, 349.
as to signing a distress warrant, 48, 215.

JUDGMENT,
in High Court actions of replevin, 367.
of the High Court, how it affects right to replevy, 346.
in County Court actions of replevin, 362.
in case of damage feasant, 362, 363.
in cases other than distress, 363.

JUDICATURE ACTS,
how they affect an agreement for a lease, 9.
how they affect the rights of a mortgagor in possession, 93.
sect. 10 of the Judicature Act, 1875, does not apply to sect. 42 of the Bankruptcy Act, 1883..93, note (*y*), 105.

JURY,
question of what is a fraudulent removal is for the, 199.

JUS TERTII,
when auctioneer entitled to set up, 341.

JUSTICES,
recovery of double value of goods fraudulently removed, 202—207.
application to, in case of excessive charges of a distress for rent, 257, 258.

JUSTICES—*continued.*
jurisdiction as to pound-breach, 318.
distress for the enforcement of orders and convictions of, 398—413.
warrant for recovery of penalty, or compensation on conviction, 398, 399.
or of sum required to be paid by an order, 399.
power to postpone issuing of a warrant, 399.
recovery of costs where information dismissed, 400.
the costs must be specified in the order of dismissal, 400.
as to the warrant of distress, 402 –407.
as to the summons, 407, 408.
when a demand not necessary, 408.
as to the order for the warrant, 408, 409.
appeal against, 409, 410.
warrant of distress should not be issued pending appeal, 403, 404.
one justice may issue a summons or a warrant, 406.
protection to justices, 407.
commitment to prison, 400, 401, 404—406, 409.
costs, 400, 409, 412.
where distress would be ruinous, or there are no goods, 401.
when defendant may be allowed to go at large, 402.
warrant of commitment, 406.
return of "*nulla bona*," 406.
where no remedy is provided in default of distress, 409.
execution of warrant of distress in English and Scotch courts, 412, 413.
appeal, 403.
costs of, 409, 410.
sale of the distress, 411, 412.
exemption of wearing apparel, 400.
power of, to proceed *ex parte* in distress for poor rates, 382.
refusal of, to grant warrant of distress for poor rates, 383.
costs on non-payment of poor rates, 385, 387, 390.
on non-payment of highway rates, 393.

JUSTIFICATION
of distress by mortgagor as bailiff of mortgagee, 90.

KEYS,
when privileged from distress, 120.

KITCHEN RANGES,
when privileged from distress, 121.

LAMMAS LANDS,
summary remedy in case of tithes, 74, 75.

LAND,
distrainor must look to the, and not to the person of the lessee, 114.
upon what part of the, distress may be made, 192—196.

LAND TAX,
deduction of, from rent, 174, 175.
costs of distress for, 259.

LANDLORD,
"succeeding," under 14 & 15 Vict. c. 25, s. 1, can recover his proportion of rent by distress, 44, 45.
does not lose his power of distress, though goods in the custody of a receiver, 82.
right of distress in case of bankruptcy, 93—96.
liability of, on severance of fixtures, 123.
must not interfere with tenant's enjoyment of house in impounding, 239, 240.
liability of, for selling goods without an appraisement, 247.
as to personal liability, 258.
to what rent landlord is entitled under 8 Anne, c. 14..244, 271, 272.
notice of claim for rent, 266.
discharge of sheriff on landlord taking security for rent, 276.
claim for rent on execution of County Court process, 278, 279.
tender to a, 292.
replevin lies against a, 350.
liability of, for acts of broker, 208—210.
on waiver of execution landlord's right to distrain revives, 278.
cannot act as an appraiser, 247.
cannot sell the goods to himself, 247.
in more favourable position than mortgagee with attornment clause, 113.

LAW OF DISTRESS AMENDMENT ACT, 1888,
exemption of wearing apparel, bedding, and tools of trade to value of 5*l*...119, 140, 146, 163, 188.
as to certificates of bailiffs, 207, 208.
as to removal of goods to public auction room, 239.
as to sale, 249, 250.
extension of time to replevy, 249—251.
as to appraisement, 244, 245.
costs of, 256, 257.
as to costs, 256—262.

LEASES,
whether an instrument operates as a lease, or an agreement for a, 8—11.
rule since the Judicature Acts, 9.
by joint tenants, 49, 50.
between tenants in common, 51.
by tenants in tail, 52.
by tenants for life, 52, 53.
by guardians, 76.
by corporations, 83.
by churchwardens and overseers, 86.
by quasi-corporations, 86.
in case of mortgages, 89—93.
distress after determination of, 53.
amount of rent distrainable where different properties are included in the same, 171.

LEAVE TO DISTRAIN,
in case of companies, 101—111.
landlord in more favourable position than mortgagee with attornment clause, 113.

LEGAL,
entry, 218, 219.
re-entry, 221—224.

LEGATEES,
distress by, 61, 62.
distinction between a devise and a legacy, 62.
as to goods in possession of a receiver in a legatee's suit, 143.

LEVANCY AND COUCHANCY,
meaning of, 303.

LIABILITY,
of sheriff under 8 Anne, c. 14..270.
of pound keeper, 231, 234, 235.
of solicitor, on undertaking given on behalf of trustee of bankrupt tenant, 102.
of landlord, for illegal and irregular acts of bailiff, 208—210.
of landlord, for selling goods without appraisement, 246.
to supply cattle in pound with food, 231—233.

LICENCE,
difference between a demise and a, 34, 35.
personal, in case of mortgages, 92.
to distrain cannot be transferred, 92.

LIMEKILN,
affixed to freehold cannot be distrained, 120.

LIMITATIONS,
Statutes of, 178—180.
effect of Agricultural Holdings (England) Act, 1883..180, 181.

LIQUIDATOR,
appointed for winding-up of a company, 105—111.
provisional, 110.
where he retains possession, 106—109.
his powers of sale, 110.

LIVE STOCK,
exemption from distress of, when on premises for breeding purposes, 147—149.

LIVERY,
horses standing at livery are liable to be distrained, 127, 128.

LOCKING
up premises when goods impounded therein, 240.

LODGER,
goods of, when privileged from distress, 150, 156—162.
provisions of the Lodgers' Goods Protection Act, 1871..156—162.
action by, for an excessive distress, 339.
goods of a, in case of a distress for poor rates, 375.
service of declaration and inventory by a, 156, 162.
meaning of the word "lodger," 158, 162.
provisions as to fraudulent removal do not apply to the goods of a, 200.

LODGERS' GOODS PROTECTION ACT, 1871,
provisions of, 156—162.
declaration and inventory under the Act, 156, 162.
notice under the Act, 156, 162.
who are lodgers, 158—162.

LODGINGS,
rent can be distrained for on demise of furnished, 3.

LOOM,
when privileged from distress, 140.

LORDS OF MANORS,
distress by, 63—66.
may distrain of common right, 63.
no distress where a lord parts with his manor, 63.
right to distrain by reason of escheat, 63, 64.
as to copyhold rents, 63.

LUNATICS (Committees of),
their powers of distress, 77.

MACHINERY,
under Agricultural Holdings (England) Act, 1883, when privileged from distress, 145.
when conditionally privileged, 127.
when deemed to be trade fixtures, 122.

MAGISTRATE. (*See also* JUSTICES.)
when replevin lies against a, 350.

MALICE,
express, need not be proved in excessive distress, 339.

MAN IN POSSESSION,
tender of rent to a, effect of, 292.
costs of, 257.

MANDAMUS,
to compel payment of poor rates, 379, 383, 384, 385.
to whom directed, 385.
protection to persons acting under a, 383.
one writ of, may compel the issue of two warrants of distress, 384, 385.

MANOR,
pound, 234.

MANORS (Lords of),
distress by, 63—66.
may distrain of common right, 63.
no distress where lord parts with his manor, 63.
right to distrain by reason of escheat, 63.

MANUAL,
services in the nature of a rent, 2.

MANUFACTORIES,
frames used in woollen, when privileged from distress, 154—156.

MARKET,
goods or cattle at a, when privileged, 127.

MARLBRIDGE (Statute of),
as to distress taken on the highway, 193, 195, 322.
as to replevin, 343.
as to excessive distress, 334, 335.
as to impounding, 236.

MARRIED WOMEN,
distress by husbands and wives, 77, 78.
as to the Married Women's Property Act, 1882..78.
replevin by, 349.

MARRIED WOMEN'S PROPERTY ACT, 1882,
as regards distress for rent, 78.

MARSHALLING
of property, where lessor exercises express and legal rights simultaneously, 112, 113.

MERCHANT (Statute),
distress in case of, 55.

MERGER
of the reversion takes away right to distrain, 282.

MESSENGER,
goods seized by a messenger under a bankruptcy, when privileged, 143.

METROPOLITAN POLICE DISTRICT,
as to distress in case of fraudulent removal, 201.
summary remedy on wrongful distress in, 325, 326.

MIDNIGHT,
rent not in arrear until after, 164, 165.

MILCH KINE,
abuse of, when in pound, 235.

MILK,
when privileged from distress, 137.

MILL,
corn sent to be ground at a, when privileged, 126.
stone, when privileged from distress, 121.

MINERALS,
machinery working, when trade fixtures, 122.

MINES,
ore worked from, can constitute a rent, 3.

MISCONDUCT,
of tenant, second distress allowed in case of, 290.

MISTAKE,
in value of goods in second distress, 288, 289.
payment made by, 288, 289.
in costs of appeal under justices' warrant, 410.
deduction of land tax by, 39, 40.

MONEY,
rent need not be in, 2.
when privileged from distress, 137.
replevin does not lie for, 348.
refunding of, on distress for poor rates, 389, 390.

MORTGAGEE,
with attornment clause, leave to distrain, 113.
when he can decline to defend replevin action, 350.

MORTGAGES,
distress in case of, 87—93.
power of distress in case of an attornment, 88.
what is necessary to constitute the relation of landlord and tenant, 88.
separate attornments, 88, 89.
uncertainty in the amount of rent, 98.
to what an attornment extends, 88.
sham rents in an, 96, 97.
leases made before and after the date of the mortgage deed, 89—93.
lease made contemporaneous with the date of the mortgage deed, 92.
a mortgagor in possession may distrain as bailiff of the mortgagee, 210.

MORTGAGOR,
restraint of, on interfering with receiver, 81.
justification by, as bailiff of mortgagee, 90.

MULES,
for spinning cotton, when privileged from distress, 121.

MURDER,
in case of clandestine removal, 202.

NETS,
when privileged from distress, 139.
in case of damage feasant, 139, 302.

NEW TRIAL,
in County Court actions of replevin, 363.

NIGHT-TIME,
distress for rent cannot be made in the, 184.
exception in case of damage feasant, 298.
as to fraudulent removal, 204.

NOMINAL DAMAGES,
in case of irregular distress, 329.

NOMINE PŒNÆ,
heirs may distrain for, 58.
are not within the 32 Hen. VIII. c. 37..60.
demand, when necessary in case of, 164.

NONSUIT,
in High Court actions of replevin, 366, 367.

NOT GUILTY BY STATUTE,
plea of, in irregular distress, 333.

NOTICE,
of distress, 227—229.
what it must contain, 228, 229.
service of, 227.
parol notice insufficient, 227.
want of notice, 228, 229.

NOTICE—*continued.*
of distress damage feasant, 307.
by landlord of claim for rent under 8 Anne, c. 14..266, 274, 275.
to sheriff of arrears of rent, 274, 275.
of appeal in County Court actions of replevin, 364.
to quit, 38, 39, 177, 188.
in case of mortgages, 88—92.
waiver of notice to quit, 190.
of appeal under Railway Rolling Stock Protection Act, 1872.. 152, 153.
in case of fraudulent removal, 203.
to officer, where poor rate ordered to be quashed, 389.
under the Lodgers' Goods Protection Act, 1871..156, 161, 162.

NOTICE OF APPEAL,
against an order for restoration of railway rolling stock, 152, 153.
in case of fraudulent removal, 203.

NOTICE TO QUIT,
right of distress where tenant holds over after a, 38, 39.
in case of a weekly tenant, 39.
in case of custom of the country, 39.
under the 11 Geo. II. c. 19, s. 18..177.
waiver of, 190.

NULLA BONA,
return of, under warrant of justices, 406.

OATH,
of appraisers, 243, 246.

OCCUPATION,
of premises retained for the convenience of the winding up of a company, 105—110.
in case of distress for poor rates, 375—377.

OFFICE,
right of distress where the Crown enters without record or, 117.

OPEN (field)
whether a sufficient pound, 230, 240.

ORDER,
in case of fraudulent removal, 203, 205, 206.
in case of wrongful distress in the Metropolitan Police District, 326.
distress for enforcement of justices, 398—413.
no order need be observed on sale of a distress, 255.

ORDER OF ADJUDICATION,
meaning of the words, 96.

ORDER OR DISPOSITION,
goods taken under a distress are not in the bankrupt's, 100.

OUTER DOOR,
cannot be broken open on a distress for rent, 218.
exception in case of fraudulent removal, 197, 218.

OUTLAWRY,
in civil proceedings now abolished, 143, note (*y*).

OVERPLUS,
after sale of a distress, 262, 265.
of sale to be left in sheriff's hands, 262, 263, 331.
meaning of, 263.
to whom paid, 263.
action where proceeds of a distress insufficient, 264.
return of surplus proceeds, 264, 265.
in case of taxes, 396.

OVERSEERS OF THE POOR,
distress by, 86.
powers of succeeding overseers, 374, 375.

OVERT,
pound, 230, 234.

OWNERSHIP,
of animals in case of damage feasant, 301.

PADLOCK,
entry by forcibly opening a, 219.

PARISH OFFICERS,
distress by, 86.

PARISH RATE,
appeal against a, 390.

PARK,
deer in a, when privileged from distress, 141.

PAROL,
notice of distress, insufficient, 227.

PARROTS,
are liable to a distress, 141.

PARTICIPATION,
in case of fraudulent removal, 204.

PARTITION,
coparceners may make several distresses after, 45, 46.
voluntary partition by joint tenants, 49.

PARTNERS,
separate attornments by mortgagors, who are, 88, 89.

PARTRIDGES,
when privileged from distress, 141.

PAVING EXPENSES,
deduction of, from rent, 176.

PAWNBROKERS,
goods in possession of, when privileged, 136.

PAYMENT,
of arrears of rent, how it affects right to distrain, 291.
made by mistake, 288, 289.
to a constable under a justice's warrant, 404, 405.
of rent, not conclusive admission of title, 176.
to redeem goods from wrongful distress, 332.
excessive, by guardians of a union, 381.

PAYMENT INTO COURT,
in case of replevin, 366.

PENALTY,
warrant for recovery of a, 398, 399.
for not stamping an appraisement, 245.
in the nature of a rent, 5, 35.

PERISHABLE GOODS,
when privileged from distress, 137.

PERSONAL CHATTEL,
rent cannot issue out of a, 3.

PERSONS
who may distrain, 40—113, 298—301.
exempted from distress, 115—118.

PHEASANTS,
when privileged from distress, 141.

PISCARY,
rent cannot issue out of a, 3.

PLACE,
where the distress may be made, 192—196.
may be made on any part of the land, 194.
where goods may be levied for a poor rate, 392.

PLAINT,
entry of, in County Court action of replevin, 359.

PLANTS,
when privileged from distress, 124.

PLEA IN BAR,
in actions of replevin, 366.

PLEDGE,
distress treated in the light of a, 146, 242.
after tender, landlord should keep the distress as a, 294.

PLOUGH,
beasts of the, when privileged from distress, 146, 147.

POLICE OFFICER, 103, 201, 223. (*See* CONSTABLE.)

POOR,
distress by overseers of the, 86.

POOR RATES (distress for), 374—393.
power of committal in default of distress, 374, 386.
power of succeeding overseers, as to, 374, 375.
occupation in case of, 375—377.
Summary Jurisdiction Act, 1879, does not apply to, 375.
lodgers' goods as to, 375, 376.
second distress in, 376.
as to the rate, 376.
demand of the rate, 376, 377.
no action, where there is a remedy by distress, 377.
complaint, 377, 378.
consolidation of proceedings for the recovery of rates, 378.

POOR RATES (distress for)—*continued.*
summons, 378.
service of, 378.
warrant of distress for, 379—385.
abandonment of a bad warrant, 381, 382.
to whom directed, 382.
when justices are bound to issue a, 383.
one warrant may be issued against any number of persons, 383, 384.
mandamus, 383—385.
power of justices to proceed *ex parte*, 382.
bill of sale not to protect chattels against poor rates, 382, 383.
refusal by justices to grant warrant, 383.
protection to justices, 383, 384.
costs, 259, 385—388, 390.
order for levying, 385, 386.
broker's charges, 386.
commitment in default of distress, 386, 387.
warrant of, 386.
costs of, 387.
tender of rates and costs, 388.
stay of proceedings, 388, 389.
appeal against, 388, 389.
notice of, 391.
refunding of money, 389, 390.
validity of rate cannot be tried by special case, 390.
place where goods may be levied, 391, 392.
place where appeal may be had, 392.
certiorari, 393.

POSSESSION,
distress on possession limited by statute, 118.
colourable, in case of fraudulent removal, 204, 205.
of premises retained for the convenience of the winding-up of a company, 105—110.
abandonment by quitting, 222, 223.
temporary abandonment, 223.
immaterial in whose possession premises are at the time of a distress, 114.
necessary in case of entry, 222.
necessary in case of rescue, 311.

POSTPONEMENT,
of issue of a warrant, 399, 400.
of right of distress by agreement, 36.

POUND,
different kinds of, 230, 231.
covert, definition of, 230.
distinction between the different kinds of, 230, 231.
liability to supply food to cattle in, 231.
liability of the pound keeper, 231, 234, 235.
entry into, to supply animals with food, 232.
recovery of compensation for food and water supplied, 232, 233.
state of the pound, 234.
theft from a pound overt, 234.
injury to beasts whilst in the, 234, 235.
escape from the, 235.
abuse of the distress whilst in the, 235.
exception in case of milch kine, 235.

POUND—*continued.*
release of cattle from the, 317, 318.
pound-breach, 312—319.

POUND-BREACH,
definition of, 312.
actual force not necessary to constitute, 312, 313.
what amounts to a, 313.
remedies for unlawful, 315—319.
at common law, 315, 316.
in case of damage feasant, 316.
in case of distress for rent, 316.
recovery of treble damages, 316.

POUND KEEPER,
obligation of, to supply food, &c., 231.
is bound to receive everything offered to his custody, 235.
is not answerable if thing be legally impounded or not, 235.
no action lies for merely receiving the distress, 235.
when he can let cattle out of a pound, 236.
cannot bring an action if the pound be broken, 236.

POUNDAGE,
sheriff entitled to, under 8 Anne, c. 14..276.

PRECEDENT,
rent payable on a condition, 170.

PRICE,
realised at auction *primâ facie* evidence of value, 255, 331.
meaning of "fair price" under the Agricultural Holdings (England) Act, 1883..148, 149.
meaning of "best price" on sale of a distress, 254, 331.

PRIORITY,
where crown comes into competition with subject, 83.

PRIVATE POUNDS, 231.

PRIVILEGE,
persons exempted from distress, 115—118.
goods privileged from distress, 118—151.
goods privileged by statute, 151—163.
absolute, 119—146.
conditional, 146—151.

PROCEEDINGS,
stay of, in case of poor rates, 388, 389.
in case of highway rates, 394.
on execution of warrant of distress by justices, 403.
on the winding up of companies, 103, 104.

PROCEEDINGS (in distress),
Statutes of Limitation, 178—181.
distress, when made, 184—192.
distress after expiration of the tenancy, 185—188.
distress, where made, 192—207.
fraudulent removal, 196—207.
distress, how made, 207—265.
as to bailiffs, 207—213.
warrant of distress, 214, 215.

PROCEEDINGS (in distress)—*continued.*
indemnity to broker, 216—218.
entry, 218—221.
re-entry, 221—224.
seizure, 224—226.
inventory, 226—229.
impounding, 229—242.
appraisement, 242—248.
sale, 243, 248—256.
expenses of sale, 243, 256—262.
surplus proceeds and unsold goods, 262—265.
satisfaction of arrears of rent by execution creditor, 266—280.

PROCEEDS
of sale, application of, 263.

PRODUCE,
of sale, how to be disposed of, 263.
wrongful retainer of, on sale of distress under justice's warrant, 411, 412.

PROFESSION,
instruments of a man's, when privileged from distress, 150, 151.

PROFESSIONAL,
appraisers need not be, 247.

PROFIT,
rent must always be a, 2.
right of distress in case of special, 300.

PROMISSORY NOTE,
effect of, in taking away right to distrain, 285.
in case of companies, 111.

PROPERTY,
in goods necessary in replevin, 348.
in goods necessary in excessive distress, 336, 337.
special property, 114, 337.

PROPERTY TAX,
deduction of, from rent, 176.

PROSECUTION,
"with effect and without delay," 343, 344, 351, 357—359.
criminal, will not lie for an excessive distress, 335.

PROSECUTOR,
committal to prison on non-payment of costs by, 406.

PROTECTION,
to justices in case of convictions and penalties, 407.
to justices in case of poor rate, 383.

PROVISIONAL
liquidator, right of distress in case of, 110.

PUBLIC,
trade, meaning of, 125, 126.
when agents held to be carrying on, 126.
auction, sale by, of distress under justice's warrant, 411.

PUBLIC POUNDS, 231.

PURCHASE,
of tenancy, apportionment of rent-service on, 22.

QUAKERS,
provisions as to tithe rent-charges in case of, 73.
may affirm, under sect. 4 of 11 Geo. II. c. 19..203.

QUIA EMPTORES,
how it affects a rent service, 14.
a fee farm rent, 17.

QUIT RENTS, 17.

RABBITS,
when privileged from distress, 141.

RAILS,
on a railway, when privileged, 122, 123.

RAILWAY ROLLING STOCK,
when privileged from distress, 151—154.

RANGE,
kitchen, when privileged from distress, 121.

RATES,
payment of, in full, on winding-up of companies, 110.
deductions from rent on payment of, 176.
poor, distress for, 374—393.
validity of, cannot be tried by special case, 390.
of toll in regard to companies, 132, 133.

RATIFICATION,
by landlord of bailiff's illegal acts, 208, 209.

REASONABLE TIME,
allowed for removal, 252.
meaning of, 252.

RECAPTION,
writ of, 370, 371.

RECEIVERS,
distress by, 78—81.
negligence by, 81.
are considered as bailiffs, 79.
estoppel where receivers make leases without authority, 79.
private, must have express authority to distrain, 79.
distinctions between powers given by the Court and by private individuals as to, 79.
in case of attornment, 79, 80.
bankruptcy, as to, 80.
receivers appointed by Court of Chancery have same power as sequestrators, 86.
goods in possession of a receiver in a legatee's suit are distrainable, 143.
interference with, 296.

RECORD,
right of distress where the Crown enters without office or, 117.

RE-ENTRY TO DISTRAIN,
when lawful, 221, 222.
demand of admittance first necessary, 222.
when illegal, 222.
in case of abandonment, 222, 223.
broker on, should confine himself to same goods, 223.
in case of the winding-up of companies, 112.
distinction between distress and re-entry in case of demand, 164, 165.

REFUNDING,
of money paid on distress for poor rates, 389, 390.

REFUSAL,
of justices to grant a distress warrant for poor rates, 383.

REGISTRAR,
of County Courts, jurisdiction in replevin, 344, 351, 352.
liability of, for taking insufficient sureties in replevin, 355.

REGISTRATION,
of rent-charge, 15.

RELEASE,
from a rent-charge under 22 & 23 Vict. c. 35, s. 10..25.

REMEDIES,
for pound-breach, 315—319.
for wrongful pound-breach on distress damage feasant, 307.
for rescue, 315—319.
for wrongful distress, 320—326.
for irregular distress, 326—334.

REMOVAL,
of goods on a distress, 252.
of goods to a public auction room under the Law of Distress (Amendment) Act, 1888..239.
costs of removal, 256, 257.
temporary, of fixtures does not destroy their exemption from distress, 121.
of goods off the premises under the 8 Anne, c. 14..269, 270.
by certiorari in action of replevin, 352, 368—370.
measure of damages for not removing in reasonable time, 330, 331.
of goods, when fraudulent, 196 *et seq.*
mere removal of goods, not of itself fraudulent, 199, 200.
of furniture on hire purchase system, 226.

RENEWAL,
of old tenancy makes a distress valid, 190.

RENT,
origin of, 1.
essentials of, 2—6, 33, 34.
must be certain, 4—6, 33, 34.
reservation of, 7—19.

RENT—*continued.*
several kinds of, 6—20.
rent-service, 6—14.
rent-charge, 14, 15.
grantees of rent-charges, 15, 68—70.
rent-seek, 16, 17.
fee farm rent, 16, 17.
rents of assize, 17.
chief rents, 17.
copyhold rents, 6, 17.
quit rents, 17.
rents payable in advance, 17, 18, 168—171.
rents distrainable of common right, 19.
distress now incident to every species of rent, 20.
seisin of, 20.
apportionment of, 21—28.
actual demise at a fixed, 29—32.
under 8 Anne, c. 14..266, 267, 270, 271—273.
is of a higher nature than a specialty debt, 285.
under County Court process, 278, 279.
under Admiralty process, 279, 280.
tender of, 291—294.
due before and after winding-up of companies, 103 *et seq.*
distress for, in case of bankruptcy, 93—103.
mortgages, 87—93.
sham rents in attornment clauses, 96—98.
uncertainty of rent in attornment clauses, 98, 99.
when due, 164—168.
when in arrear, 164.
gale, 167.
payable on a condition precedent, 170.
amount of, for which a distress may be made, 171—174.
deductions from, 174—177.
double, 38, 177, 178.
demand of, previous to a distress, 164, 181—184.
under tenure of frankalmoign, 6.
penalties in the nature of a, 5, 35.
effect of taking securities for, 285, 286.
payments to gas companies are not, 95.

RENT-CHARGE,
why so called, 15.
deed necessary for its creation, 15.
enrolment and registration of a, 15.
where created without power of distress, 15, 16, 52.
difference between rent-service and a, as regards apportionment, 25.
how it differs from a rent-seek, 16.
how it differs from a tithe rent-charge, 70, 71.
how distinguishable from an annuity, 66.
under the Tithe Commutation Acts, 70—76.
apportionment of a, 24, 26.
copyholders cannot be distrained upon for a, 116.
distress on cattle of joint tenants for a, 116.
distress by grantees of a, 68—70.
interest of mortgagor in possession cannot support a, 69.
provisions of the Conveyancing Act, 1881, as to a, 70.
deductions of, from rent, 175.
demand of, when necessary, 164, 181—184.
how affected by act of God in case of tithe rent-charge, 74.

RENT PAYABLE IN ADVANCE,
not recoverable in action for use and occupation, 18.
in case of mortgages, 89.
the reservation must be clearly expressed to be, 18, 168.
decisions on, 18, 169, 170.

RENT-SECK,
how created, 16.
why so called, 16.
effect of *Quia Emptores* as to, 14.
how it differs from a rent-charge, 16.
result of severance of rent-service from reversion, 16.
rights of heir as to a, 56.
as regards reversioners, 41.
right of distress given by 4 Geo. II. c. 28, in cases of, 20.

RENT-SERVICE,
origin of, 6.
distress incident to it of common right, 6.
how it differs from a rent-seck, 14.
copyhold rents are in their very nature, 6, 17.
essentials of a, 7—11.
to whom and how reserved, 11—14.
improper reservations of, 12, 13.
reservation on conveyance of a life estate, 52.
reservation in case of doubt, 13.
provisions of Conveyancing Act, 1881, as to, 14.
result of severance of, from the reversion, 16.
effect of statute *Quia Emptores* as to a, 14.
apportionment of, 21—24.
difference between rent-charge and, as regards apportionment, 25.
demand of, when necessary, 164, 181—184.

REPLEVIN,
definitions of, 342, 344.
at common law, 342, 343.
by statute, 343.
writ of *capias in withernam* in, 343.
sheriff's deputies in, 350, 351.
sale after notice of, 329, 330.
powers of sheriffs taken away by County Courts Act, 1888, in, 344, 350, 351.
exclusive jurisdiction to grant replevins, 344, note (*l*), 356, 359.
extends to all wrongful takings of goods, 344, 345.
right to replevy cannot be taken away, 344, note (*n*).
for what replevin lies, 345.
to what it extends, 344, 345.
time for making a, 249—251, 344, 345.
in case of damage feasant, 347.
extension of time under the Distress Act, 1888..249—251, 347.
what may be replevied, 348.
by whom replevin may be had, 348, 349.
a property in the goods is necessary, 348.
against whom replevin may be had, 349, 350.
jurisdiction of registrar of County Court in, 344, 350, 351.
bond in, 343, 353, 354, 364, 370, 372.
recovery of sum deposited in lieu of bond, 353, 373.

REPLEVIN—*continued.*
liability of sheriff for taking insufficient sureties in, 355, 356.
liability of registrar in, 355, 356.
objections to sufficiency of sureties, 356.
County Court actions of replevin, 352, 353, 359—364.
costs in, 352, 353, 363.
rules of County Court in, 354—356, 360, 363, 365.
fees payable in, 356, 357.
search in County Court for replevins, 254.
meaning of "prosecuting with effect and without delay," 343, 344, 351, 357—359.
High Court actions of, 351, 364—370.
time for commencement of, 351, 364.
indorsement of writ, 364.
joinder of causes of action, 364, 365.
damages in, 365, 366, 367, 371.
defences, 366.
payment into Court, 366.
discontinuance of action, 366.
nonsuit, 36, 367.
execution, 367.
writ of *de retorno habendo*, 367.
removal by certiorari into High Court, 368—370.
stay of proceedings, 369.
security, 370.
writ of recaption, 370, 371.
writs of second deliverance and return irreplevisable, 371, 372.
proceedings on the replevin bond, 372.
defeasance of the bond, 372.
liability of the sureties, 372, 373.
recovery of the sum deposited in lieu of bond, 353, 373.
right to begin in, 373.
in case of second distress, 290, 291.
as regards sale of a distress, 241, 249, 250.
extension of time to fifteen days under the Distress Act, 1888, 249—251.
as to coparceners, 45.
as to tenants in common, 50.
when mortgagee can decline to defend action of, 350.

REPLICATION,
in actions of replevin, 366.

REQUEST
for appraisement under the Distress Act, 1888..244, 245.
for removal of goods to auction room, 244, 245.
costs of removal, 256, 257.
by tenant for extended time to replevy, 249—251.

RESCUE,
what it is, 311.
requisites of, 311.
what amounts to a, 312, 313.
rescue in law, 312.
before impounding, 313, 314.
by whom to be made, 314.
in case of abandonment, 314.
in case of the abuse of a distress, 314, 315.

RESCUE—*continued.*
remedies for unlawful, 315—319.
distinction between distress for rent and damage feasant as to, 316.
treble damages for, 316, 317.
on fraudulent removal, 202.
of cattle from a pound, 317, 318.
when no criminal offence, 315.

RESERVATION,
of rent-service, 7—14.
to whom and how reserved, 11—14.
must be reserved on a sufficient conveyance, 7.
must be to lessor himself and not to a stranger, 11, 12.
must be conformable to the nature of the estate, 12.
must be incident to the reversion, 14.
improper reservations, 12, 13.
in case of doubt, 13.
of rent payable in advance, 17, 18.
of a rent-charge, 15.
of rent-seek, 16.

RESTORATION,
order for restoration of live stock taken to be fed at a fair price, 149.
of railway rolling stock, 152.
of frames used in woollen manufactories, 155.
of property under Lodgers' Goods Protection Act, 1871..157.

RESTRAINT,
of a distress by injunction, 295, 296.
of a distress between commoners, 64.
on further proceedings in the winding-up of companies, 104.
of mortgagor who interferes with receiver, 81.

RESTRICTIVE COVENANTS,
in case of sale of a distress, 144, 145, 255, 256.
landlord not bound to sell subject to, 145, 255.

RETAINER,
wrongful, of produce, on sale of distress under justice's warrant, 411, 412.

RETURN
of surplus proceeds of sale of a distress, 264, 265.

RETURN IRREPLEVISABLE,
writ of, 371, 372.

REVENUE LAWS,
replevin does not lie where the taking was under the, 346.

REVERSION,
severance of, how it affects right to distrain, 40, 41, 282.
rent-service must be incident to the, 14.
effect of *Quia Emptores*, 14.
severance of the, how it affects apportionment of rent-service, 23.
landlord must have the, 40.
assignment of the, by landlord, 40—43.
merger of, takes away right of distress, 282.

REVERSIONERS,
distress by, 40—45.
as regards rent-seck, 41, 42.

REVIVAL
of right to distrain on payment, 285.

RIGHT TO BEGIN,
in replevin, 373.

RIGHT TO DISTRAIN,
how affected by chief clerk's certificate, 81.
may be given by agreement between commoners, 299, 300.
how taken away, 281—296.
where no actual demise at a fixed rent, 29—32, 281.
by expiration of the term, 281, 282.
by determination of the lessor's interest, 282.
where lessor parts with reversion, 282.
by merger of the reversion, 282.
by non-performance of a condition precedent, 282.
by agreement not to distrain, 283, 284.
acceptance of single instead of double rent, 284.
by agreement for interest on rent, 284.
by taking a security for rent, 285, 286.
restraint of a distress by injunction, 295, 296.
second distress, 286—291.
in case of insufficiency, 286—290.
in case of replevin, 290, 291.
by payment of the rent in arrear, 291.
by tender of the rent in arrear, 291—295.
to whom tender may be made, 292, 293.
tender before and after impounding, 293, 294.
as regards a surety under Mercantile Law Amendment Act, 1856..286.

ROYAL PALACE,
distress within precincts of a, 84, note (*a*).

ROYALTY,
in nature of a rent, 5.

RUINOUS,
committal to prison where distress would be, 401.

RULES,
in County Court actions of replevin, 354—356, 360, 363, 365.

SALE,
power to sell animals impounded for cost of food, 232, 233.
of a distress, 248—256.
landlord cannot sell goods to himself in a distress, 252.
until, property in goods remains in tenant, 114, 248.
how it affects goods *in custodiâ legis*, 114.
when compulsory, 249.
no sale allowed if tenant replevies within five days, 249, 250.
alteration to fifteen days by Distress Act, 1888..249—251.
time for removal of goods before, 251, 252.
consent by tenant that goods on premises shall remain with distrainor, 253, 254.

SALE—*continued.*
search in County Court for replevins before, 254.
meaning of best price on, 254, 255.
no particular order to be observed in sale, 255.
in case of restrictive covenants, 255, 256.
application of proceeds of, 264, 265.
deduction of expenses of distress, 263.
overplus to be left with sheriff, 263, 264, 331.
of goods without appraisement, 330.
measure of damages, 330.
after notice of replevin, 329, 330.
remedy for selling a distress too soon, 328.
when it takes away the right to replevy, 346.
of distress under justice's warrant, 411, 412.
a distress damage feasant cannot be sold, 307, 308.
liability of auctioneer for goods in his hands during, 136.
removal of goods to auction room for, 239.
price realised at sale by auction is *primâ facie* evidence of value, 255, 331.
expenses of, in levying, 257.
by appraiser, when irregular, 247, 330.
of distress for taxes, 396.

SATISFACTION,
of arrears of rent by execution creditor, 142, 266—280.

SCALE
of fees under Distress Act, 1888..259, 260.

SCHEDULE,
of costs of a distress under 20*l*...257—259.
over 20*l*...259—261.

SCHOLAR,
books of a, when privileged from distress, 150.

SCOTCH COURTS,
execution of warrant in, 412, 413.

SEAL,
corporations aggregate must make leases under, 85.
order for distress warrant need not be under, 408, 409.
tithes must be demised by an instrument under, 75.

SEARCH,
necessary in ejectment under Common Law Procedure Act, 1852, 190, 191.
in County Court for replevins, 254.

SECOND DELIVERANCE,
writ of, 371, 372.

SECOND DISTRESS,
in case of bankruptcy, 101, 102.
where mistake in value, 173, 288, 290.
in case of insufficiency, 286, 287.
whole amount of rent must be distrained for at once, 286.
abandonment of first distress, 288.
when wrongful, 288.
where there has been a tender, 288.

SECOND DISTRESS—*continued.*
is allowed where there has been a mistake in the value of the goods, 288, 289.
where the tenant is guilty of misconduct, 290.
in case of replevin, 290, 291.
in case of trespassing animals, 306.

SECURITY,
for costs, in County Court actions of replevin, 352, 353, 363.
for rent, effect of taking, 285, 286.
in case of companies, 111.
discharge of sheriff under 8 Anne, c. 14..278, 279.
required in High Court actions of replevin, 351—353.
for bailiff's certificates, 212, 213.

SEISIN,
of rent, 20.
unity of, between coparceners, as regards apportionment, 47.

SEIZURE,
how made, 224—226.
constructive, 225, 226.
when second, is allowed, 173, 174, 286 *et seq.*
of fixtures, constructive, 123.
acts sufficient to constitute a, 224—226.
of goods off the premises after expiration of the tenancy, 187.
tortious, 335.

SEPARATE
attornments in case of partners, 89.

SEPARATION. (*See also* SEVERANCE.)
of rent from the reversion, 16.

SEQUESTRATORS,
receivers appointed by Chancery have same powers as, 86.
distress by, 86.

SERVANT,
tender of rent to a, effect of, 293.

SERVICE,
of inventory, 227.
of summons for non-payment of poor rates, 378.

SERVICES,
manual, in the nature of a rent, 2.
corporal, rights of executors and administrators as to, 60.

SET-OFF,
effect of, in taking away right to distrain, 285.

SEVERANCE,
of fixtures, liability of landlord on, 123.
is an irregularity under 11 Geo. II. c. 19..330.
of rent from reversion, 16.
of reversion, apportionment of rent-service on, 23.
of reversion, takes away right to distrain, 40, 41.
of estate by acts of joint tenants, 48, 49.

SEWER RATES,
deduction of, from rent, 176.
costs on distress for, 259.

SHAM RENTS,
in attornment clauses, 96—98.

SHEEP,
when privileged from distress, 146, 147.
remedy for wrongful distress of, 147, 321.

SHERIFF,
time which elapses between delivery by sheriff and removal by purchaser, 272.
goods in the hands of a, when privileged from distress, 141.
liability of, for rent under 8 Anne, c. 14..270, 271, 273—275.
duties of, 275.
notice to, by landlord, 269, 270, 276.
discharge of, on landlord's taking a security for rent, 278, 279.
deputies of, in replevin, 350, 351.
powers of, now taken away in replevin, 344, 350, 351.
liability of, for taking insufficient sureties, 355.
overplus of sale to be left in hands of, 264, 265.
seizure within six months after expiration of tenancy by, 187.
what sheriff can prove in mitigation of damages, 276.

SHIP,
not "delivered" by shipbuilder liable to distress, 131, 132.

SHRUBS,
when privileged from distress, 124.

SIX CARPENTERS' CASE,
rules laid down as to tender in, 293.

SLEEPERS
on a railway, when not distrainable for rent, 123.

SOLICITOR,
undertaking by, to pay rent in case of bankruptcy, 102.

SPECIAL CASE,
right to begin in replevin in a, 373.
validity of poor rate cannot be tried by a, 390.

SPECIAL CERTIFICATE,
for bailiffs, 212.

SPECIAL CONSTABLE,
presence of, in case of fraudulent removal, 201.

SPECIAL MATTER,
given in evidence under 11 Geo. II. c. 19..332, 333.

SPECIAL PROPERTY, 114, 306.

SPECIALTY DEBT,
rent is of a higher nature than a, 285.

SPURS,
can be rendered by way of rent, 2.

STABLE,
breaking open the outer door of a, 219.

STAMP,
on appraisement, 245.
on an undertaking to indemnify broker is not required, 218.
not required in a warrant of distress, 215.

STANDINGS,
in a factory, distress for, 5, 35.

STAPLE,
entry by pulling out a, 219.

STAPLE (Statute),
distress by tenants by, 55.

STATE,
of the pound, 234.

STATUTE,
distress on possession limited by, 118, 119.
goods privileged from distress by, 151—163.
merchant and staple, distress in case of, 55.

STATUTES OF LIMITATION,
effect of, as regards landlord's right to distrain, 178—180.
as regards annuities, 180.

STAY OF PROCEEDINGS,
on the winding up of companies, 104.
in High Court actions of replevin, 369.
on a replevin bond, 372.
on tender of poor rates, 388, 389.
in case of highway rates, 394.

STEALING
cattle from pound, 234.

STOCK,
must generally be impounded on the premises, 238.
live, when privileged from distress, 147, 148.
protection of railway rolling, from distress, 151—154.

STRANGERS,
goods of, cannot be taken under County Court execution, 278, 279.
when exempted from distress, 114, 116.
when liable to distress, 114.
consent by landlord that stranger's goods shall be exempt from distress, 151.
rent-service cannot be reserved to, 11.
how altered by Conveyancing Act, 1881..14.
rescue cannot be made by, 314.
cattle of, when liable to distress, 116.
provisions as to fraudulent removal do not apply to goods of, 200.

STRAW,
when privileged from distress, 138, 139.

STREET,
distress cannot be taken in a common, 194.

SUBJECT,
competition between Crown and, as to distress, 83, 117, 118.

SUCCEEDING,
overseers, power of, on distress for poor rates, 374, 375.
right of distress by succeeding landlord under 14 & 15 Vict. c. 25, s. 1., 44, 45, 186.

SUFFERANCE,
tenancies on, distress for, 33.

SUMMARY JURISDICTION (Court of),
has power to determine disputes with regard to live stock taken in to be fed at a fair price, 149, 150.
order for restoration of railway rolling stock by a, 152.
order for restoration of frames used in woollen manufactories wrongfully seized by a, 155.
appeal against an order of a, for recovery of double value of goods fraudulently removed, 206, 207.

SUMMARY JURISDICTION ACT, 1879,
does not apply to distress for poor rates, 375.
highway rates, 393.
in case of distress warrant by justices, 398 *et seq.*

SUMMONS,
for non-payment of a poor rate, 378.
when it should be served before issuing distress warrant by justices, 407.
in County Court actions of replevin, 360.

SUNRISE,
meaning of, 184.

SUNSET,
definition of, 184.
tender must be made before, 294.
demand of rent must not be made after, 164, 165.

SURCHARGE
of a common, distress for, 298.

SURETIES,
objection to sufficiency of, in replevin, 356.
liability of sheriff for taking insufficient, 355.
liability of registrar for taking insufficient, 355.
on a replevin bond, 343, 372, 373.
whether entitled to right of distress, 286.

SURPLUS,
proceeds of a distress, 262—265.
return of, 264, 265.
to whom the overplus should be paid, 263.
in case of bankruptcy, 93.

SURRENDER,
distress remains until there is a complete, 36.
apportionment of rent-service as regards, 22.
of the term as regards reversioners, 43.

SURVIVOR,
may distrain for arrears of rent accrued in lifetime of deceased joint tenant, 48.

TAILOR,
cloth delivered to a, to be made up, not distrainable, 126.

TAXES,
rules as to costs in distress for, 259.
deduction of, from rent, 176.
rights of collector of, as against company's goods, 105.
deduction of one year's rent on distress for, 277.
distress for, 277.
provisions of Taxes Management Act, 1880..277, 395—398.
distress by collector on refusal to pay, 395.
collector may break open houses, 395.
the levy, 395.
time when distress must be kept, 395.
appraisement of the distress, 396.
sale of the distress, 396.
overplus of the distress, 396.
deduction of expenses, 396.
fines upon constables and other officers, 396.
where collectors pay over duties in advance, 396, 397.
committal to prison of defaulter, 397.
where defaulter has removed, 397.
schedule of arrears, 397.
fresh warrants, 397, 398.
when a constable may be called in, 398.

TEMPORARY,
removal of fixtures does not destroy their exemption from distress, 121.
exemption from distress of goods of temporary guests at an inn, 137.
abandonment, 223.

TENANCY AT WILL,
distress in case of a, 32.

TENANTS BY ELEGIT,
distress by, 55.

TENANTS BY STATUTE MERCHANT,
distress by, 55.

TENANTS BY STATUTE STAPLE,
distress by, 55.

TENANTS BY THE CURTESY,
distress by, 54.

TENANTS FOR LIFE,
distress by, 52.

TENANTS IN COMMON,
may distrain severally, 50.
when they may distrain jointly, 50.

TENANTS IN COMMON—*continued.*
in replevin they sever and avow separately, 50, 349.
allotments under the Inclosure Acts in case of, 51.
distress, damage feasant by, 301.
leases between, 51.
may join in signing a distress warrant, 215.

TENANTS IN DEMESNE,
distress must be made whilst in possession of, 59.

TENANTS IN DOWER,
distress by, 54.
as to annuities, 54.

TENANTS IN FEE SIMPLE,
distress by, 51.

TENANTS IN FREEBENCH,
distress by, 54.

TENANTS IN TAIL,
distress by, 52.
after possibility of issue extinct, 52.

TENANTS *PUR AUTRE VIE,*
distress by, 52.
executors and administrators of, 57.

TENANTS UNDER EXECUTION,
distress by, 55.

TENDER,
of rent, 182, 291—295.
before seizure, 293.
without expenses, 291.
authority of bailiff to accept, 292.
cannot be limited by landlord, 292.
to whom made, 292, 293.
to the landlord, 292.
need not be to the broker, 292, 293.
to an agent, 292.
to a mere man in possession or servant, insufficient, 292, 293.
rules laid down in *Six Carpenters' Case* as to, 293.
tender before and after impounding, 293.
action under 2 Will. & Mary, sess. 1, c. 5, s. 2..294.
after, landlord should keep the distress as a pledge, 294.
when to be made, 294, 295.
of what it must consist, 294.
in case of damage feasant, 308.
no distress allowed without a demand after a, 182.
second distress after a, 288.
of poor rates, 388.
of highway rates, 394.
in case of justices, 404, 405.

TERM,
expiration of, destroys right to distrain, 282.

THEFT,
from a pound, 234.

THINGS IN ACTUAL USE,
when exempted from distress damage feasant, 301, 302.
are exempt from distress for rent, 139, 140.
things conditionally privileged may be absolutely privileged from their being in actual use, 140, 146.

THRESHING MACHINE,
when privileged from distress, 140.

TIME,
for making a distress, 184—188.
after expiration of tenancy, 185—188.
cannot be made in the night-time, 184.
must be made between sunrise and sunset, 184.
meaning of sunrise and sunset, 184.
when executors and administrators may distrain, 61.
for sale of a distress under justice's warrant, 411, 412.
apportionment of rent in respect of, 26—28.
reasonable time allowed for removal of goods before sale, 252.
for making a replevin, 249—251, 344, 345.
in case of distress damage feasant, 347.
extension of time under the Distress Act, 1888..249—251.
for sale of distress, must be stated in distress warrant, 381.

TIME OF GRACE,
allowed on payment of rent, 167.

TITHES,
distress by owners of, 70.
provisions of the various statutes for the commutation of tithes, 70—76.
commutation, how effected, 71.
difference between tithe rent-charge and ordinary rent-charge, 71.
charge on produce and not on inheritance, 72.
right of entry where rent-charge in arrear, 72.
provisions in case of Quakers, 73.
summary remedy in respect of Lammas lands and commons in gross, 74.
must be demised by deed, 75.
deduction of, from rent, 176.
costs of distress for, 259.

TITLE,
payment of rent not conclusive admission of, 176.
as to Statutes of Limitations, 179.

TITLE DEEDS,
replevin of, 348.

TITLE PARAMOUNT,
apportionment of rent-service by persons having, 22.
exemption from distress by persons holding by, 115.
in case of strangers, 116.

TOLL,
seizure of goods on non-payment of, 132.

TOOLS,
of trade, when privileged, 140, 146, 150.
exemption of, under Law of Distress Amendment Act, 1888..119, 140, 146, 151, 163, 188.

TORTIOUS ACTS,
of joint tenants, 48.
corporations aggregate are liable for their agent's, 85, 86.
of coparceners, 46.
seizure, 335.

TRADE,
exemption from distress of goods delivered to a person in the way of his, 125—137.
tools of, when privileged from distress, 140, 146, 150.
exemption of, under Law of Distress Amendment Act, 1888..119, 140, 146, 151, 163, 188.
meaning of public, 125, 126.
as regards agents, 126.
machinery, when deemed to be trade fixtures, 122.

TREBLE
costs, now abolished, 316, 317.
damages, on a rescue in case of fraudulent removal, 202.
in case of a distress for rent, 316.

TREES,
when privileged from distress, 124.

TRESPASS,
when maintainable in distress damage feasant, 306.
excessive distress, 334, 335.

TRESPASSER *AB INITIO*,
on abuse of distress damage feasant, 307, 308.
entire value recoverable in case of a, 321, 322.
as to part of the thing distrained, 322.
how affected by the 11 Geo. II. c. 19..326, 327.

TROVER,
as regards demand of goods, 332.
payment to redeem goods from wrongful distress, 332.
where auctioneer refuses to deliver up goods, 340.

TRUSTEE,
under bankruptcy, as to fraudulent removal, 200.
where annuity is vested in a, for a term, 66.
distress by a, 63.
replevin of goods assigned to a, 348, 349.

UNCERTAINTY,
in amount of rent does not render attornment clause void, 98.

UNCONDITIONAL,
tender of rent should be, 294, 295.

UNDERTAKING,
to indemnify a bailiff does not require an agreement stamp, 218.

UNDER-TENANTS,
right of distress on goods of, 114, 116.
right of assignee in bankruptcy on sale of goods of, 103.
whether, are lodgers, 158.
beasts of, when privileged from distress, 147.

UNRIPE,
action for selling growing crops when, 331.

USE AND OCCUPATION,
rent payable in advance is not recoverable in an action for, 18.

VALUATION,
after appraisement, 248.

VALUE
of goods, mode of calculating in excessive distress, 339, 340.
price realised at auction *primâ facie* evidence of, 255, 331.

VESTURE,
cannot constitute a rent, 3.

VIEW,
of goods after appraisement, 248.

VOID *AB INITIO*,
where a distress is, 321, 322.
damages recoverable, 322.
how affected by the 11 Geo. II. c. 19..326, 327.

WAIVER,
by distress, 189.
of disclaimer, 190.
by tenant of right of action for wrongful distress, 324.
of forfeiture, 188, 189.
of action in case of agreements as to a distress, 324.
of notice to quit, 190.
of execution, how it affects landlord's right to distrain, 143.

WAREHOUSE,
goods deposited in a, when privileged, 134, 136.

WARRANT OF DISTRESS,
for rent, 214—216.
is not strictly necessary, 214.
does not require a stamp, 215.
who may join in signing a, 215.
in case of fraudulent removal, 203.
for poor rates, 379—385.
for highway rates, 393.
as to justice's, 398, 399, 402—404, 407, 408.
on non-payment of taxes, 395—398, 405.

WEARING APPAREL,
when privileged from distress, 119, 140.
exemption of, on sale of a distress under justice's warrant, 400.
under law of Distress Amendment Act, 1888..119, 140, 146, 163, 188.

WEAVER,
materials delivered to a, when privileged from distress, 126.
horse sent with yarn to a, when privileged from distress, 127.

WEEKLY TENANCIES,
distress in case of, 32.
holding over after notice to quit, 39.
landlord's claim for rent in case of, 267.

WESTMINSTER II. (Statute of),
as to bailiffs under the, 207, notes (*r*) and (*s*).

WHARFINGERS,
goods in warehouse of, when distrainable, 134.

WINDING UP OF COMPANIES,
distress where premises retained for convenience of, 105—107, 109.

WINDOW,
entry through, to distrain, 220, 221.
when privileged from distress, 120.

WITHDRAWAL,
of a distress, 289.

WITNESS,
when necessary in service of notice of inventory, 227.

WOOLLEN MANUFACTORIES,
exemption from distress of frames used in, 154, 155.
order for restoration of the frames, 155.

WORKING
a distress whilst in the pound, 235, 236.

WRIT,
indorsement of, in replevin, 364.
in wrongful distress, 324, 325.
of "*de retorno habendo*," 371.
of "*capias in withernam*," 343, 367, 368.
of recaption, 370.
of second deliverance, 371, 372.
of return irreplevisable, 371, 372.

WRONGFUL DISTRESS,
forms of action in, 320, 324, 325.
distress altogether wrongful, 320, 321.
where distress is void *ab initio*, 321, 322.
remedies for, 321.
damages for, what recoverable, 321.
remedy where distress taken on the highway, 322.
where no rent is owing, 323.
recovery of double value under 2 Will. & Mary, sess. 1, c. 5.. 323.
what is a "taking" sufficient to maintain an action, 323.
in what cases tenant waives his right of action, 324.
against whom action should be brought, 324.
alternative remedies, 324.
form of indorsement of writ, 324, 325.
form of action against landlord who sells a distress, 325.
summary remedy within the metropolitan police district for, 325, 326.

WRONGFUL DISTRESS—*continued.*
where excessive as well as, 336.
damage feasant, remedies for, 307.
payment to redeem goods from, 332.

WRONGFUL RETAINER,
of produce on sale of a distress under justice's warrant, 411, 412.

YARN
carried to be weighed is exempt from distress, 140.

YEARLY
rent must issue, 4.

YOUNG
animals, replevin of, 348.

LONDON:
PRINTED BY C. F. ROWORTH, GREAT NEW STREET, FETTER LANE, E.C.

Palmer's Companies Act, 1907, and the Limited Partnerships Act, 1907.—With Explanatory Notes, Rules and Forms. *Second Edition.* By Sir FRANCIS BEAUFORT PALMER, Bencher of the Inner Temple. *Royal 8vo.* 1908. *Price 7s. 6d. cloth.*

Palmer's Company Precedents.—For use in relation to Companies subject to the Companies Acts.

PART I.: GENERAL FORMS. *Ninth Edition.* By Sir FRANCIS BEAUFORT PALMER, Bencher of the Inner Temple, assisted by the Hon. C. MACNAGHTEN, K.C., and FRANK EVANS, Barrister-at-Law. *Royal 8vo.* 1906. *Price 36s. cloth.*

PART II.: WINDING-UP FORMS AND PRACTICE. *Tenth Edition.* By Sir FRANCIS BEAUFORT PALMER, Bencher of the Inner Temple *Royal 8vo* (*In preparation.*)

PART III.: DEBENTURES AND DEBENTURE STOCK. *Tenth Edition.* By Sir FRANCIS BEAUFORT PALMER, Bencher of the Inner Temple. *Royal 8vo.* 1907. *Price 25s. cloth.*

Pollock's Digest of the Law of Partnership.—With an Appendix of Forms. *Eighth Edition.* With an Appendix on the Limited Partnerships Act, 1907, and Rules. By Sir FREDERICK POLLOCK, Bart., Barrister-at-Law. *Demy 8vo.* 1908. *Price 10s. cloth.*

Pollock's Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law. *Eighth Edition.* By Sir FREDERICK POLLOCK, Bart., Barrister-at-Law, Author of "Principles of Contract," "A Digest of the Law of Partnership," &c. *Demy 8vo.* 1908. *Price 1l. 5s. cloth.*

Campbell's Principles of English Law.—Founded on Blackstone's Commentaries. By ROBERT CAMPBELL, Barrister-at-Law, Editor of "Ruling Cases," &c. *Demy 8vo.* 1907. *Price 20s. cloth.*

Shirley's Selection of Leading Cases in the Common Law.—With Notes. *Eighth Edition.* By RICHARD WATSON, Barrister-at-Law. *Demy 8vo.* 1908. *Price 16s. cloth.*

Warburton's Selection of Leading Cases in the Criminal Law.—With Notes. *Fourth Edition.* By HENRY WARBURTON, Barrister-at-Law. *Demy 8vo.* 1908. *Price 12s. 6d. cloth.*

Strahan's General View of the Law of Property.—*Fifth Edition.* By J. A. STRAHAN and J. SINCLAIR BAXTER, Barristers-at-Law. *Demy 8vo.* 1908. *Price 12s. 6d. cloth.*

Smith's Practical Exposition of the Principles of Equity, illustrated by the Leading Decisions thereon. *Fourth Edition.* By H. ARTHUR SMITH, Barrister-at-Law. *Demy 8vo.* 1908. *Price 1l. 1s. cloth.*

Wills' Theory and Practice of the Law of Evidence.—By WM. WILLS, Barrister-at-Law. *Second Edition.* By the Author and THORNTON LAWES, Barrister-at-Law. *Demy 8vo.* 1907. *Price 15s. cloth.*

Beddoes' Concise Treatise on the Law of Mortgage.—*Second Edition.* By W. F. BEDDOES, Barrister-at-Law. *Demy 8vo.* 1908. *Price 12s. 6d. cloth.*

Williams' Law relating to Legal Representatives.—Being a Concise Treatise on the Law of Executors and Administrators, as modified by the Land Transfer Act, 1897. By SYDNEY E. WILLIAMS, Barrister-at-Law. *Demy 8vo.* 1908. *Price 9s. cloth.*

Cornish's District Councils.—A concise Guide to their Powers and Duties. By H. D. CORNISH, Barrister-at-Law. *Demy 8vo.* 1908. *Price 7s. 6d. cloth.*

Davey's Poor Law Settlement and Removal.—By HERBERT DAVEY, Barrister-at-Law. *Demy 8vo.* 1908. *Price 9s. cloth.*

Burge's Colonial Law.—Commentaries on Colonial and Foreign Laws Generally and in their Conflict with each other. New and Enlarged Edition. By A. WOOD RENTON, Puisne Judge, Ceylon, and G. G. PHILLIMORE, Barrister-at-Law, assisted by Experts in the several systems of Law. *Five Vols. Royal 8vo. Price, net, 8l. 8s. cloth.*

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 821 074 2

THE GREATEST WORK IN LEGAL LITERATURE.

KING'S BENCH SERIES now publishing.

THE ENGLISH REPORTS,

1378 to 1865.

FULL VERBATIM REPRINT ANNOTATED.

CONSULTATIVE COMMITTEE:

The Right Hon. THE EARL OF HALSBURY, lately Lord High Chancellor of [Great Britain;
The Right Hon. LORD ALVERSTONE, Lord Chief Justice of England;
The Right Hon. LORD COLLINS, a Lord of Appeal in Ordinary;
Sir R. B. FINLAY, K.C., lately Attorney-General.

FOLLOWING on the complete re-issue in 71 volumes of the House of Lords, Privy Council, Chancery, Rolls Court and Vice-Chancellors Reports, the KING'S BENCH SERIES is now in course of publication, and may be subscribed for separately.

This series is perhaps the most important of all the reports prior to 1865. A complete set of the originals from Bellewe, 1378-1400, down to and including Best and Smith, 1861-1866, with all the collateral reporters, extends to no fewer than 250 volumes of all sizes and styles of printing. These are very costly, and would almost require a separate room for their accommodation. Subscribers will have the privilege of possessing a complete annotated reprint of all of these invaluable reports in about 40 uniform volumes in a modern and much more legible style of type, at a cost of **30s.** per volume.

The reports will be reprinted in strictly chronological order, and as the original pagination and machinery of reference will be maintained, references from text-books and digests will be found even more easily than in the originals.

NOW ISSUED.

HOUSE OF LORDS (1694 to 1866), complete in 11 vols. royal 8vo. Price *net*, half bound, **£22.**

PRIVY COUNCIL (including Indian Appeals) (1809 to 1872), complete in 9 vols. Price *net*, half bound, **£13:10s.**

CHANCERY (including Collateral Reports) (1557 to 1866), complete in 27 vols. Price *net*, half bound, **£40:10s.**

ROLLS COURT (1829 to 1866), complete in 8 vols. Price *net*, half bound, **£12.**

VICE-CHANCELLORS (1815 to 1865), complete in 16 vols. Price *net*, half bound, **£24.**

The Volumes are not sold separately.

Full particulars sent on application to—

STEVENS & SONS, Ld., 119 & 120, Chancery Lane, London.

*** A large stock of Second-hand Law Reports and Text-books on Sale.*